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JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION

MAR 30 2007

FILED  
CLERK'S OFFICE**BEFORE THE JUDICIAL PANEL  
ON MULTIDISTRICT LITIGATION**

In re:

PET FOOD PRODUCT LIABILITY  
LITIGATION

MDL No. \_\_\_\_\_

**PLAINTIFF SHIRLEY SEXTON'S MOTION FOR TRANSFER AND  
COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. § 1407**

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 Plaintiff, *Shirley Sexton*

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MOTION FOR TRANSFER AND COORDINATION OR CONSOLIDATION

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 MULTIDISTRICT  
 LITIGATION

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PLEADING NO. 11

Plaintiff in the action listed below, by her attorneys, moves the Panel pursuant to 28 U.S.C. § 1407 to transfer the pending cases identified in the schedule filed concurrently herewith to the United States District Court for the Central District of California, and to consolidate them for pretrial purposes before the Honorable George H. King.

As set forth below and in the accompanying Memorandum, Movant believes the actions listed on the accompanying Schedule of Actions satisfy the requirements for consolidation and coordination because they concern common questions of fact and law and consolidation or coordination will serve the interests of efficiency and convenience.

In support of this Motion, Movant states as follows:

1. Movant is the plaintiff in the following case:

***Shirley Sexton v. Menu Foods Income Fund, Inc.***

United State District Court for the Central District of California  
Case No. 07-cv-01958-GHK (AJWx).

2. The *Sexton Action* is a class action brought on behalf of all United States' residents who purchased contaminated pet food from Menu Foods Income Fund, Menu Foods Inc., and Menu Foods Midwest Corporation (collectively referred to as "Menu Foods").

3. Specifically, the *Sexton Action* alleges that Menu Foods sold contaminated pet food to the general public that could cause severe injuries and death to pets that consumed the food.

4. The *Sexton Action* seeks damages on behalf of all individuals who purchased the defendant's contaminated pet food.

5. The factual allegations in the related actions contain identical allegations concerning the defendant's sale of contaminated pet food to the public. (See Complaints attached hereto as Exhibits A (*Sexton*), B (*Holt*) C (*Sims*), D (*Majerczyk*), E (*Whaley*), and F (*Workman*). The cases are all similar with respect to the legal theories supporting

their claims. All of the plaintiffs assert claims for compensatory damages, claims under state unfair and deceptive acts statutes, as well as common law claims, arising out of the defendant's conduct. Moreover each of the related actions is a class action and seeks relief on behalf of the same class of persons: all persons who purchased the contaminated pet food sold by the defendant. In each case, the district court will be asked to determine the following factual and legal issues raised against defendants:

- a) Whether Defendants intentionally, recklessly or negligently authorized injurious pet food to enter the market;
- b) Whether Defendants failed to properly test their "cuts and gravy" style dog and cat food before market entry of such foods;
- c) Whether Defendants intentionally, recklessly or negligently delayed in instituting a recall of its "cuts and gravy" style dog and cat food;
- d) Whether Defendants' recall is adequate and properly notifies potentially affected consumers;
- e) Whether Defendants' conduct constituted unlawful, unfair, or fraudulent business practices under state consumer protections statutes;
- f) Whether Defendants have been unjustly enriched as a result of their conduct;
- g) Whether Plaintiff and members of the Class have sustained damages as a result of Defendants' conduct, and, if so, what is there appropriate measure of damages; and
- h) Whether Plaintiff and members of the Class are entitled to punitive damages, and, if so, in what amount.

6. Discovery conducted in each of the actions proposed for consolidation will be substantially similar, and will involve the same or similar documents and witnesses, since each case arises from virtually identical operative facts relating to Menu Food's conduct.

7. Absent transfer of all of these cases to a single forum for coordinated and consolidated pretrial proceedings, there is a substantial risk of inconsistent and conflicting pretrial rulings on discovery and other key issues, such as class certification.

8. There has been no discovery in any of the actions and no initial disclosures have been made. Since all actions are in the beginning stage of litigation, no prejudice or inconvenience will result from transfer, coordination, and/or consolidation.

9. Efficiency in the administration of justice will be served by consolidation, because one judge rather than three judges can supervise all pretrial proceedings and render rulings that are consistent for all plaintiffs on common issues.

10. For the reasons stated in this Motion and the Memorandum of Law submitted herewith, Movant respectfully request that all cases listed in the attached schedule be transferred to the United States District Court for the Central District of California to be consolidated for pretrial purposes before the Honorable George H. King.

Dated: 3-26-07

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JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION

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**BEFORE THE JUDICIAL PANEL  
ON MULTIDISTRICT LITIGATION**

In re:

PET FOOD PRODUCT LIABILITY  
LITIGATION

MDL No. \_\_\_\_\_

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TRANSFER AND  
COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. § 1407**

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Plaintiff, *Shirley Sexton*

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MULTIDISTRICT  
LITIGATION

Movant, Shirley Sexton, on behalf of herself and all others similarly situated, ("Movant") seeks transfer and coordination or consolidation under 28 U.S.C. § 1407 of all related "PET FOOD PRODUCT LIABILITY LITIGATION" filed in the federal courts. Plaintiff seeks to have all cases identified in the accompanying schedule transferred to the United States District Court for the Central District of California.

## **I. INTRODUCTION**

There are currently six federal actions of which Movant is aware ("the pending cases"), that seek relief for individuals who purchased contaminated pet food from the defendants, Menu Foods Income Fund, Inc., Menu Foods Midwest Corporation, and Menu Foods, Inc. (collectively referred to as "Menu Foods"). The federal courts have original diversity jurisdiction over these state and common law based actions pursuant to The Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d).

Specifically, the pending cases allege that Menu Foods sold contaminated pet food to the general public and that individuals whose pets consumed the food suffered severe injuries and, in some cases, death. All of the pending cases seek to certify a class of United States' residents who purchased the contaminated pet food and seek to compensate them for all damages incurred as a result of the defendant's conduct.

None of the six pending cases is advanced and no discovery has been conducted. The actions are currently pending in the District Courts of New Jersey, Tennessee, Arkansas, Illinois, Washington and the Central District of California. Each arises from identical conduct involving the same defendant, and from common questions of law and fact. Prompt coordination and judicial action under the federal court's broad powers should be invoked to promote the efficient prosecution of the pending actions.

///

## II. ARGUMENT

### A. **Transfer To One District For Coordinated Or Consolidated Pretrial Proceedings Will Promote The Goals Of Ensuring The Just And Efficient Conduct Of The Actions, And Avoiding Inconsistent Or Conflicting Substantive And Procedural Determinations.**

The purpose of 28 U.S.C. § 1407 is to provide centralized management, under a single court's supervision, of pretrial proceedings of litigation arising in various districts to ensure the just, efficient and consistent conduct and adjudication of such actions. *In re New York City Mun. Sec. Litig.*, 572 F.2d 49, 50 (2d Cir. 1978).

The transfer of actions to a single forum under § 1407 is appropriate where, as here, it will prevent duplication of discovery, and, most importantly in the instant case, it will eliminate the possibility of overlapping or inconsistent pleading and class action determinations by courts of coordinate jurisdiction. *In re Litig. Arising from Termination of Retirement Plan for Employees of Fireman's Fund Ins. Co.*, 422 F. Supp. 287, 290 (J.P.M.L. 1976); *In re LTV Corp. Sec. Litig.*, 470 F. Supp. 859, 862 (J.P.M.L. 1979); *In re Exterior Siding and Aluminum Coil Litig.*, 538 F. Supp. 45, 47 (D.C. Minn. 1982); *In re "Agent Orange" Prod. Liability Litig.*, 597 F. Supp. 740, 752 (E.D.N.Y. 1984), *affirmed*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988), *on remand*, 689 F.Supp. 1250 (E.D.N.Y. 1988).

As noted above, such transfer and coordination is particularly appropriate at this time because formal discovery is in its infancy in each of the actions. Thus, coordination and transfer will effectuate an obvious savings of time and resources. The litmus test of transferability and coordination under § 1407 is the presence of common questions of fact. *In re Fed. Election Campaign Act Litig.*, 511 F. Supp. 821, 823 (J.P.M.L. 1979). Each of the pending actions is a class action arising directly and explicitly from Menu Food's sale of contaminated pet food to the general public. Proof in the pending actions will plainly involve identical factual issues.

Furthermore, since each of the pending cases is brought as a class action, consistent and efficient rulings on class certification issues are critical. *See, e.g., In Re: Piper Aircraft Distribution Sys. Antitrust Litig.*, 405 F.Supp. 1402, 1403-04 (J.P.M.L. 1970); *In Re: Baldwin-United Corporation Litig.*, 581 F.Supp. 739 (J.P.M.L. 1984); *In Corporation Litig.*, 581 F.Supp. 739 (J.P.M.L. 1984).

**B. The Convenience of the Parties Will Be Served By Transfer to the Central District of California.**

Transfer will serve the convenience of the parties by drawing the lawsuits to one central location. Lawsuits have now been filed in New Jersey, Washington, Tennessee, Arkansas, Illinois and the Central District of California. Movant respectfully submits that the Central District of California, would be a particularly suitable forum for the just and prompt handling of pretrial proceedings as it offers a convenient location, a skilled and experienced trial judge, an efficiently managed and speedy docket, and a strong interest in the resolution of these claims.

Further, as the situs of one of the nation's busiest airports, the Central District of California, located in downtown Los Angeles, would be easily accessible to all parties, counsel and other participants in the pretrial process. More importantly, however, California as the most populous state in the country, is clearly home to the largest number of Class Members.

Finally, the Honorable George H. King to whom Movant's case is assigned, has substantial experience with class actions and complex commercial litigation developed during 12 years in the federal judiciary. Judge King's depth of experience and reputation for efficiently handling complex cases makes him an exceptional candidate to manage these complex cases.

Additionally, Judge King is currently handling no other MDL matters and his courthouse is home to only 9 MLD's overall. As such, his court will likely be able to dedicate the time and resources to effectively manage these cases.



**C. The Need For Transfer and Coordination in the Class Action Context.**

Of central concern to Plaintiff is the potential for disruption, confusion and prejudice created by the pendency of at least five actions seeking class-wide relief in five different districts. The Panel has consistently held that when the risk of overlapping or inconsistent class determinations exists, transfer of actions to a single district for coordinated or consolidated pretrial proceedings is necessary in order to eliminate the possibility of inconsistent pretrial rulings, especially concerning class issues. *In re Bristol Bay, Salmon Fishery Antitrust Litig.*, 424 F.Supp. 504, 506 (J.P.M.L. 1976); *In re Litig. Arising from Termination of Retirement Plan for Employees of Fireman's Fund Ins. Co.*, 422 F. Supp. at 290 (J.P.M.L. 1976); *In re Nat'l Airlines, Inc., etc.*, 399 F.Supp. 1405, 1407 (J.P.M.L. 1975); *In re Roadway Express, Inc. Employment Practices Litig.*, 384 F.Supp. 612, 613 (J.P.M.L. 1974). This is true even when only two actions are involved. *In re First Nat'l Bank, etc.*, 451 F.Supp. 995, 997 (J.P.M.L. 1978).

**III. CONCLUSION**

For the foregoing reasons, and for those stated in the accompanying Motion, Plaintiff respectfully requests that the three pending "PET FOOD PRODUCT LIABILITY LITIGATION" actions be transferred and coordinated and/or consolidated in the District of Massachusetts under 28 U.S.C. § 1407, and that all related individual or class actions be transferred thereto as "tag along actions."

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In re:

PET FOOD PRODUCT LIABILITY  
LITIGATION

MDL No. \_\_\_\_\_

**REVISED RULE 7.2(a)(ii) SCHEDULE OF ACTIONS**

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**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA**

*Shirley Sexton v. Menu Foods Income Fund, Menu Foods, Inc., a New Jersey Corporation, and Menu Foods Midwest Corporation, a Delaware corporation*  
Case No. 07-cv-01958-GHK (AJWx); The Honorable George H. King

**UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TENNESSEE**

*LizaJean Holt v. Menu Foods, Inc.*  
Case No. 07-CV-00094-TWP; The Honorable Thomas W. Phillips

**UNITED STATES DISTRICT COURT WESTERN DISTRICT OF ARKANSAS**

*Charles Ray Sims and Pamela Sims v. Menu Foods Income Fund, Menu Foods Midwest Corporation, Menu Foods South Dakota Inc., Menu Foods, Inc., Menu Foods Holdings, Inc.*  
Case No. 07-CV-05053-JLH; The Honorable Jim Larry Hendren

**UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS**

*Dawn Majerczyk v. Menu Foods, Inc., a New Jersey Corporation*  
Case No. 07-CV-01543; The Honorable Wayne R. Anderson

**UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON**

*Tom Whaley v. Menu Foods, Inc., a foreign corporation, The Iams Company, a foreign corporation, Dog Food Producers Numbers 1-50 and Cat Food Producers 1-40*  
Case No. 07-CV-00411-RSM; The Honorable Richardo S. Martinez

**UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY**

*Jared Workman, and Mark and Mona Cohen v. Menu Foods Limited, Menu Foods, Inc., and Menu Foods Midwest Corporation*  
Case No. 07-CV-01338-NLH; The Honorable Noel L. Hillman

Dated: 3-27-07

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By: \_\_\_\_\_

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MULTIDISTRICT LITIGATION**

In re:

PET FOOD PRODUCT LIABILITY  
LITIGATION

MDL Docket No.

**REVISED CERTIFICATE OF SERVICE**

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Plaintiff, *Shirley Sexton*RECEIVED  
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I, Lisa C. Anderson, employed by Kershaw, Cutter & Ratinoff, LLP, do hereby state under penalty of perjury that:

1. On March 26, 2007, I caused to be served the following papers:

**PLAINTIFF SHIRLEY SEXTON'S MOTION FOR TRANSFER AND  
COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. § 1407;**

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TRANSFER  
AND COORDINATION OR CONSOLIDATION UNDER 28 U.S.C. § 1407;**

**RULE 7.2(a)(ii) SCHEDULE OF ACTIONS.**


2. On March 26, 2007, I caused those papers to be served by Federal Express upon:

Michael J. Beck  
Clerk of the Panel  
One Columbus Circle, NE  
Thurgood Marshall Federal  
Judicial Building  
Room G-255, North Lobby  
Washington, D.C. 20002-8004

3. On March 26, 2007, I caused those papers to be served via First Class Mail upon:

**SEE ATTACHED SERVICE LIST**

Executed on March 26, 2007, at Sacramento, California.



Lisa C. Anderson

**SERVICE LIST**

Shirley Sexton v. Menu Foods, Inc., et al.  
United States District Court, Central District of California  
Civil Action No. 07-cv-01958-GHK

Clerk of the Court  
**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
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**MENU MIDWEST CORPORATION** **Defendant**  
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**SERVICE LIST, Cont.**

LizaJean Holt v. Menu Foods, Inc.;

United States District Court Eastern District of Tennessee (Knoxville Division)  
Civil Action No. 07-cv-00094-TWP

Clerk of the Court

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**SERVICE LIST, Cont.**

Charles Ray Sims, et al. v. Menu Foods, Inc., et al.  
United States District Court, Western District of Arkansas (Fayetteville Division)  
Civil Action No. 07-cv-05053-JLH

Clerk of the Court  
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**WESTERN DISTRICT OF ARKANSAS**  
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**SERVICE LIST, Cont.**

Dawn Majerczyk v. Menu Foods, Inc.;  
United States District Court, Northern District Of Illinois (Eastern Division)  
Civil Action No. 07-cv-01543-WRA

Clerk of the Court  
**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF ILLINOIS**  
**(EASTERN DIVISION)**  
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**SERVICE LIST, Cont.**

Tom Whaley v. Menu Foods, et al.;  
United States District Court, Western District of Washington (Seattle)  
Civil Action No. 07-cv-00411-RSM

Clerk of the Court  
**UNITED STATES DISTRICT COURT**  
**WESTERN DISTRICT OF WASHINGTON**  
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**Defendant**

**SERVICE LIST, Cont.**

Workman, et al. v. Menu Foods, Inc., et al.;  
United States District Court, District of New Jersey  
Civil Action No. 07-cv-01338-NLH

Clerk of the Court  
**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEW JERSEY**  
4<sup>th</sup> & Cooper Streets, Room 1050  
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**Defendant**

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Pennsauken, NJ 08110

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**Defendant**

## **Exhibit A**

---

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16 Attorneys for *Plaintiff*

17 **IN THE UNITED STATES DISTRICT COURT**

18 **CENTRAL DISTRICT OF CALIFORNIA**

19 **SHIRLEY SEXTON**, on behalf of  
20 herself and all others similarly  
21 situated,

22 **Plaintiff,**

23 **v.**

24 **MENU FOODS INCOME FUND,**  
25 **MENU FOODS, INC.**, a New  
26 Jersey corporation, and **MENU**  
27 **FOODS MIDWEST**  
28 **CORPORATION**, a Delaware  
corporation,

**Defendants.**

Case No. CV07-01958BHK (ASW)

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

1 Plaintiff Shirley Sexton ("Plaintiff"), individually and on behalf of all others  
2 similarly situated, alleges by and through her attorneys, upon information and  
3 belief, as follows:

4 **NATURE OF THE ACTION**

5 1. Plaintiff brings this class action on behalf of herself and a class of  
6 consumers and entities who purchased brands of pet food manufactured by  
7 Defendants that caused pets to suffer severe illness or death. Pet owners, believing  
8 Defendants' products to be safe for pet consumption, incurred substantial expenses  
9 relating to the purchase of the pet food and to the veterinary monitoring and  
10 treatment that became necessary after their pets consumed Defendants' pet food.  
11 Such expenses were even more extreme for those pet owners whose pets became  
12 terminally ill after consuming Defendants' pet food products. Such costs arose and  
13 were exacerbated by the undue amount of time taken by Defendants to announce  
14 the dangers associated with its dog and cat foods. Although Defendants knew that  
15 pet illnesses and deaths could be related to their pet foods, Defendants waited for  
16 nearly a month before telling the public and the Food and Drug Administration  
17 (FDA) that it was recalling its products. Defendants' lethal products, and the  
18 companies' excessive delay in warning consumers and regulatory agencies as to its  
19 dangers, resulted in significant financial loss to thousands of pet owners.

20 **JURISDICTION AND VENUE**

21 2. The Court has original jurisdiction over this class action pursuant to 28  
22 U.S.C. § 1332(d)(2).

23 3. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(a)(1)  
24 because Plaintiff resides in this judicial district. Venue is also proper pursuant to  
25 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving  
26 rise to the claim occurred in this judicial district.

27 4. The members of the putative Class have suffered aggregate damages  
28 exceeding \$5,000,000, exclusive of interest and costs.



**PARTIES**

5. Plaintiff Shirley Sexton is a resident of Los Angeles County, California.

6. Defendant Menu Foods Income Fund is a Canadian company with its principal executive offices located at 8 Falconer Drive, Streetsville, Ontario, Canada L5N 1B1.

7. Defendant Menu Foods, Inc. is a New Jersey corporation with its principal executive offices located at 9130 Griffith Morgan Lane, Pennsauken, New Jersey 08110.

8. Defendant Menu Foods Midwest Corporation is a Delaware corporation with its principal executive offices located at P.O. Box 1046, 1400 East Logan Avenue, Emporia, Kansas 66801. Menu Foods Midwest Corporation is a wholly-owned subsidiary of Menu Foods, Inc.

9. Unless otherwise stated, Defendants Menu Foods Income Fund, Menu Foods, Inc., and Menu Foods Midwest Corporation are collectively referenced as "Defendants."

10. At all times herein mentioned, Defendants were the agents, principals, employees, servants, partners, joint venturers, and representatives of each other. In doing the acts hereinafter alleged, they each were acting within the scope and course of their authority as such agents, principals, employees, servants, partners, joint venturers, and representatives, and were acting with the permission and consent of the other Defendant.

**FACTUAL ALLEGATIONS**

11. Defendants manufacture and sell pet food internationally and are the biggest supplier of pet food in North America.

12. Defendants sell pet food under nearly 100 different brand names, some of which are the most popular brands of dog and cat food in the industry – e.g., Iams, Eukanuba, Science Diet, among others.

13. Defendants sell their brands internationally and in some of the largest

1 major retail chains in the United States, such as Wal-Mart, Safeway, Kroger,  
2 PetSmart and Meijer.

3 14. On March 16, 2007, Defendants, in conjunction with the Food and Drug  
4 Administration (FDA), announced a massive immediate recall of approximately 60  
5 million containers of "cuts and gravy" pet food (pet food consisting of pieces of  
6 meat in gravy) throughout the United States based on widespread reports of pet  
7 illness and death, mostly related to kidney failure. The recall covers all "cuts and  
8 gravy" we pet food produced and distributed by Defendants, including over ninety  
9 different brands of dog and cat food. Some of the brands recalled include, Iams,  
10 Eukanuba, Best Choice, Paws, and Nutro Max. Defendants' recall is the largest pet  
11 food recall in United States history.

12 15. However, Defendants waited an excessive period of time before deciding  
13 to recall its harmful and lethal products. Defendants first started receiving  
14 complaints of pet illnesses and deaths as early as late-February, almost a full month  
15 before deciding to recall its products. *See, e.g., CBSNews.com, Pet Food Co.*  
16 *Knew of Problem Last Month*, March 20, 2007, at  
17 <http://www.cbsnews.com/stories/2007/03/20/national/main2587087.shtml> (last  
18 viewed March 22, 2007). Rather than announcing its products could be harmful to  
19 pets as soon as it learned of pet illnesses and deaths, Defendants decided to conduct  
20 its own testing. Defendants conducted tests involving over 50 animals to observe  
21 reactions to its pet foods. Approximately one in six of the animals tested died. Yet,  
22 Defendants again waited until as many as seven test subjects died after eating its pet  
23 food before finally submitting its findings to the FDA and deciding that a recall and  
24 announcement to the public would be necessary.

25 16. Due in no small part to this unnecessary and protracted delay, as of  
26 March 21, 2007 there have been at least seventy-two reported pet deaths from  
27 kidney failure nationwide and additional deaths continue to be reported by the hour.  
28 One source indicated that 1,715 dogs and cats were either sick or dead as a result of

1 the recalled food products. See <http://www.petconnection.com/blog/> (last viewed  
2 March 22, 2007).

3 17. Pet owners purchased Defendants' products believing them to be safe for  
4 pet consumption and beneficial to their pets. However, the "cuts and gravy" style  
5 pet food that pet owners across the nation have fed their pets has proved to be toxic,  
6 causing renal failure in cats and dogs as well as physical disorders such as  
7 dehydration, diarrhea, loss of appetite, increased thirst, lethargy, and vomiting.

8 18. Pet owners have incurred substantial expenses relating both to the  
9 purchase of Defendants' pet food and from the medical costs associated with  
10 monitoring and treating pets who have consumed, or were thought to have  
11 consumed, Defendants' contaminated food products. Indeed, several pet owners  
12 have accrued veterinary bills that have climbed into the several thousands of  
13 dollars. Furthermore, for those pet owners whose pets became terminally ill, they  
14 were forced to incur additional costs relating to their pets death, such as euthanizing  
15 and, for some, burying or cremating their pet.

16 19. Currently, Defendants still have not identified the cause of the food  
17 toxicity. However, aminopterin, a substance found in rat poisons, was recently  
18 discovered in the recalled foods.

19 20. In addition, pet owners who have become increasingly concerned about  
20 their pet's health after learning of the recall have received little to no relief from  
21 Defendants. Defendants have failed to manage the high volume of incoming  
22 complaints. Since instituting the recall, pet owners have been largely unable to  
23 reach Defendants' customer service representatives, often encountering busy  
24 signals or voicemail messages. See, e.g., *Thejournalnews.com*, *Pet Owners*  
25 *Growling over Food Recall*, March 20, 2007, at  
26 <http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20070320/BUSINESS>  
27 [01/703200345/1066](http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20070320/BUSINESS) (last viewed March 22, 2007). To be sure, Defendants have  
28 been criticized for not being cooperative with customers, for not getting helpful

1 information out to the public sooner and for failing to “get control of the crisis . . .  
2 employ[ing] a bunker mentality in times of trouble.” Joseph R. Perone, The Star-  
3 Ledger, *Menu Foods Fails Test in Crisis Management*, March 21, 2007, available  
4 at [http://www.nj.com/starledger/stories/index.ssf?/base/business-](http://www.nj.com/starledger/stories/index.ssf?/base/business-6/117445554784980.xml&coll=1)  
5 [6/117445554784980.xml&coll=1](http://www.nj.com/starledger/stories/index.ssf?/base/business-6/117445554784980.xml&coll=1) (last viewed March 23, 2007).

6 21. Since the recall, Defendants have received scores of complaints and  
7 questions from consumers who have purchased its contaminated pet food products  
8 and from those whose pets have become ill or died after consuming those products.

9 22. The complaints found throughout the Internet and in many of the news  
10 stories mentioned above each contain the same common theme of consumers who  
11 unwittingly purchased Defendants’ food products and who were forced to take their  
12 pets to veterinarians for medical treatment after their pets became extremely, and  
13 sometimes terminally ill.

14 23. Plaintiff Shirley Sexton regularly purchased *Special Kitty* brand wet pet  
15 food from Wal-Mart Stores, Inc. before the recall was announced.

16 24. Four cats lived in Ms. Sexton’s household. Two of Ms. Sexton’s three  
17 cats, Red and Kelso, ate the *Special Kitty* pet food every day. Spike, a cat  
18 belonging to Ms. Sexton’s daughter, also ate *Special Kitty* pet food on a daily basis.

19 25. On or March 16 and March 17, 2007, Shirley noticed that both Red and  
20 Kelso were ill. She took Red and her two other cats in to the veterinarian. Two of  
21 the three cats, including Kelso, were initially found to be healthy. However, the  
22 veterinarian discovered Red had kidney failure and decided to keep Red overnight.  
23 On March 20, 2007, the veterinarian determined that Red’s condition had  
24 significantly worsened and Ms. Sexton, in order to spare her pet from suffering any  
25 further, made the decision to have Red euthanized that same day.

26 26. After her experience with Red, Ms. Sexton also brought her daughter’s  
27 cat, Spike, to the veterinarian for testing. The veterinarian determined that Spike –  
28 who also ate Wal-Mart’s *Special Kitty* brand food – was suffering from kidney

1 failure. As of the date of this complaint, Spike remains in the veterinary hospital.

2 27. To date, Ms. Sexton has incurred at least \$1,100 in veterinary bills.

3 **CLASS ACTION ALLEGATIONS**

4 28. Plaintiff brings this action as a class action pursuant to Federal Rule of  
5 Civil Procedure 23(a) and 23(b) on behalf of herself and all others similarly situated  
6 as members of the following class (the "Class"): All persons and entities that  
7 purchased "cuts and gravy" style dog or cat food manufactured, distributed,  
8 marketed and/or sold by Defendants.

9 29. Subject to additional information obtained through further investigation  
10 and discovery, the Class definition may be expanded or narrowed by amendment or  
11 amended complaint. Specifically excluded from the proposed Class are business  
12 entities for purposes of Plaintiff's claim for relief under the California Consumers  
13 Legal Remedies Act, Civil Code § 1750, *et seq.* Also specifically excluded are  
14 Defendants, their officers, directors, agents, trustees, parents, children,  
15 corporations, trusts, representatives, employees, principals, servants, partners, joint  
16 venturers, or entities controlled by Defendants, and their heirs, successors, assigns,  
17 or other persons or entities related to or affiliated with Defendants and/or their  
18 officers and/or directors, or any of them; the Judge assigned to this action, and any  
19 member of the Judge's immediate family.

20 30. **Numerosity.** The members of the Class are so numerous that their  
21 individual joinder is impracticable. Plaintiff is informed and believes, and on that  
22 basis alleges, that the proposed class contains tens of thousands of members. The  
23 precise number of Class members is unknown to Plaintiff. The true number of  
24 Class members are known by Defendants, however, and thus, may be notified of  
25 the pendency of this action by first class mail, electronic mail, and by published  
26 notice.

27 31. **Existence and Predominance of Common Questions of Law and**  
28 **Fact.** Common questions of law and fact exist as to all members of the Class and

1 predominate over any questions affecting only individual Class members. These  
2 common legal and factual questions include, but are not limited to, the following:

- 3 a. Whether Defendants intentionally, recklessly or negligently authorized  
4 injurious pet food to enter the market;
- 5 b. Whether Defendants failed to properly test their “cuts and gravy” style  
6 dog and cat food before market entry of such food;
- 7 c. Whether Defendants intentionally, recklessly or negligently delayed in  
8 instituting a recall of its “cuts and gravy” style dog and cat food;
- 9 d. Whether Defendants’ recall is adequate and properly notifies  
10 potentially affected consumers;
- 11 e. Whether Defendants’ conduct constituted unlawful, unfair, or  
12 fraudulent business practices in violation of Cal. Bus. & Prof. Code  
13 §§ 17200, et seq., as alleged herein;
- 14 f. Whether Defendants have been unjustly enriched as a result of their  
15 conduct, as alleged herein;
- 16 g. Whether Plaintiff and members of the Class have sustained damages as  
17 a result of Defendants’ conduct, and, if so, what is the appropriate  
18 measure of damages; and
- 19 h. Whether Plaintiff and members of the Class are entitled to punitive  
20 damages, and, if so, in what amount.

21 32. **Typicality**. Plaintiff’s claims are typical of the claims of the members  
22 of the Class in that Plaintiff and each member of the Class purchased “cuts and  
23 gravy” style dog or cat food manufactured, distributed, marketed and/or sold by  
24 Defendants.

25 33. **Adequacy of Representation**. Plaintiff will fairly and adequately  
26 protect the interests of the members of the Class. Plaintiff has retained counsel  
27 experienced in complex consumer class action litigation, and Plaintiff intends to  
28 prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests



1 to those of the Class.

2       34. **Superiority.** A class action is superior to all other available means for  
3 the fair and efficient adjudication of this controversy. The damages or other  
4 financial detriment suffered by individual Class members is relatively small  
5 compared to the burden and expense that would be entailed by individual litigation  
6 of their claims against the Defendants. It would thus be virtually impossible for  
7 Class, on an individual basis, to obtain effective redress for the wrongs done to  
8 them. Furthermore, even if Class members could afford such individualized  
9 litigation, the court system could not. Individualized litigation would create the  
10 danger of inconsistent or contradictory judgments arising from the same set of facts.  
11 Individualized litigation would also increase the delay and expense to all parties  
12 and the court system from the issues raised by this action. By contrast, the class  
13 action device provides the benefits of adjudication of these issues in a single  
14 proceeding, economies of scale, and comprehensive supervision by a single court,  
15 and presents no unusual management difficulties under the circumstances here.

16       35. In the alternative, the Class may be certified because:

- 17       a. the prosecution of separate actions by individual Class members  
18       would create a risk of inconsistent or varying adjudication with respect  
19       to individual Class members that would establish incompatible  
20       standards of conduct for the Defendants;
- 21       b. the prosecution of separate actions by individual Class members would  
22       create a risk of adjudications with respect to them that would, as a  
23       practical matter, be dispositive of the interests of other Class members  
24       not parties to the adjudications, or substantially impair or impede their  
25       ability to protect their interests; and/or
- 26       c. Defendants have acted or refused to act on grounds generally  
27       applicable to the Class thereby making appropriate final and injunctive  
28       relief with respect to the members of the Class as a whole.

1 36. Adequate notice can be given to Class members directly using  
2 information maintained in Defendants' records, or through publication notice.

3 37. Defendants benefited from the sale of its "cuts and gravy" style dog and  
4 cat food to Plaintiff and the Class. The benefit to Defendants can be identified from  
5 the sale of such pet food to Plaintiff and the Class and that such monies can be  
6 restored to Plaintiff and the Class. Such monies are the property of the Plaintiff and  
7 the Class. All or a portion of this benefit retained by Defendants is money in which  
8 Plaintiff and the Class have an ownership interest. Plaintiff and the Class were  
9 injured and lost money as a result of Defendants' unfair, unlawful and fraudulent  
10 business practices described herein.

11  
12 **FIRST CLAIM FOR RELIEF**

13 **[Violation of Consumers Legal Remedies Act, Cal. Civ. Code § 1750, *et seq.*]**

14 38. Plaintiff hereby incorporates by reference each of the preceding  
15 allegations as though fully set forth herein. Plaintiff asserts this claim against each  
16 and every Defendant on behalf of herself and the Class.

17 39. Defendants are each a "person" as defined by Cal. Civ. Code § 1761(c).

18 40. Plaintiff and the proposed Class members are "consumers" within the  
19 meaning of Cal. Civ. Code § 1761(d).

20 41. Plaintiff's purchase of dog and cat food manufactured, distributed,  
21 marketed and sold by Defendants constitute "transactions" within the meaning of  
22 Civil Code section 1761(e) and 1770.

23 42. Defendants' conduct violated and continues to violate the CLRA in at  
24 least the following respects:

- 25 a. In violation of Section 1770(a)(1) of the CLRA, Defendants  
26 misrepresented the source, sponsorship, approval or certification of  
27 goods or services; and  
28



1 b. In violation of Section 1770(a)(5) of the CLRA, Defendants  
2 represented that its goods or services sponsorship, approval,  
3 characteristics, uses or benefits which they do not have.

4 43. Defendants engaged in these unfair or deceptive acts and practices with  
5 the intent that they result, and which did result, in the sale of dog and cat food to  
6 Plaintiff and the Class.

7 44. In engaging in unfair or deceptive conduct in violation of the CLRA,  
8 Defendants actively concealed and intentionally failed to disclose material facts  
9 about the characteristics of their dog and cat food, and further represented that such  
10 food was suitable for pet consumption.

11 45. As a result of Defendants' acts and practices as alleged in this  
12 Complaint, Plaintiff seeks an Order enjoining Defendants from continuing to  
13 engage in unlawful, unfair or fraudulent business practices, and any other act  
14 prohibited by law. Plaintiff has contemporaneous with this filing provided notice to  
15 Defendants, and will amend to add claims for damages under the CLRA if  
16 Defendants do not take appropriate corrective action.

17 **SECOND CLAIM FOR RELIEF**  
18 **[Negligence]**

19 46. Plaintiff hereby incorporates by reference each of the preceding  
20 allegations as though fully set forth herein. Plaintiff asserts this claim against each  
21 and every Defendant on behalf of herself and the Class.

22 47. Defendants owed a duty to Plaintiff and the Class to provide pet food  
23 safe and suitable for pet consumption.

24 48. Through their failure to exercise due care, Defendants were negligent in  
25 manufacturing, distributing, marketing and selling pet food to Plaintiff and the  
26 Class.

27 49. Defendants failed to implement adequate quality control and adequate  
28 testing of its pet food that they introduced into the stream of commerce for sale to  
Plaintiff and the Class and for consumption by their pets.

1 50. Defendants knew, or should have known, that their pet food, as  
2 described above, presents an unreasonable and unacceptable risk of injury or death  
3 to pets, and would result in foreseeable and avoidable damage.

4 51. The losses and damages described herein were foreseeable and  
5 avoidable.

6 52. Defendants' negligence proximately caused the losses and damages to  
7 Plaintiff and the Class.

8 **THIRD CLAIM FOR RELIEF**  
9 **[Violation of the California Unfair Competition Law,**  
10 **Business & Professions Code §§ 17200, *et seq.*]**

11 53. Plaintiff hereby incorporates by reference each of the preceding  
12 allegations as though fully set forth herein. Plaintiff asserts this claim against each  
13 and every Defendant on behalf of herself and the Class.

14 54. Defendants' acts and practices, described herein, constitute unlawful,  
15 unfair or fraudulent business practices in violation of the Unfair Competition Law,  
16 Business & Professions Code sections 17200 et seq ("UCL").

17 55. The utility of Defendants' manufacturing, distribution, marketing and/or  
18 sale of contaminated dog and cat food is significantly outweighed by the gravity of  
19 the harm they impose on Plaintiff and the Class. Defendants' acts and practices are  
20 oppressive, unscrupulous or substantially injurious to consumers.

21 56. The above-described unfair, unlawful and fraudulent business practices  
22 conducted by Defendants present a threat and likelihood of harm and deception to  
23 members of the Class in that Defendants have systematically perpetrated and  
24 continue to perpetrate the unfair, unlawful and fraudulent conduct upon members of  
25 the public by engaging in the conduct described herein.

26 57. Plaintiff and the Class have suffered harm as a proximate result of the  
27 wrongful conduct of the Defendants alleged herein, and therefore bring this claim  
28 for relief for restitution and disgorgement. Plaintiff is a person who has suffered

1 injury in fact and has lost money and property as a result of such unfair  
2 competition.

3 58. Pursuant to Business and Professions Code sections 17200 and 17203,  
4 Plaintiff, on behalf of herself and the Class, seeks an order of this Court: enjoining  
5 Defendants from continued manufacture, distribution, marketing and sale of "cuts  
6 and gravy" style dog and cat food in an unfair, unlawful and fraudulent manner, and  
7 an order enjoining Defendants from collecting money from the Class from the sale  
8 of pet food. Plaintiff further requests an order awarding Plaintiff and the Class  
9 restitution and disgorgement of profits acquired by Defendants by means of such  
10 unlawful acts and practices, so as to deter Defendants and to rectify Defendants'  
11 unfair and unlawful practices and to restore any and all monies to Plaintiff and the  
12 Class, which are still retained by Defendants, plus interest and attorneys' fees and  
13 costs pursuant to, *inter alia*, Code of Civil Procedure section 1021.5.

14 **FOURTH CLAIM FOR RELIEF**  
15 **[For Unjust Enrichment]**

16 59. Plaintiff hereby realleges and incorporates by reference all paragraphs  
17 previously alleged herein. Plaintiff asserts this claim against each and every  
18 Defendant on behalf of herself and the Class.

19 60. Defendants have received, and continue to receive, a benefit at the  
20 expense of Plaintiff and members of the Class. Defendants have knowledge of this  
21 benefit.

22 61. Defendants have charged and collected from consumers, including  
23 Plaintiff and members of the Class, money for dog and cat food that endangers the  
24 lives of their pets. Defendants thus have received benefits that they have unjustly  
25 retained at the expense of Plaintiff and members of the Class.

26 62. As a direct and proximate result of Defendants' unlawful acts and  
27 conduct, Plaintiff and members of the Class were deprived of the use of their  
28 monies that was unlawfully charged and collected by Defendants, and are therefore

1 entitled to restoration of their monies.

2  
3 **FIFTH CLAIM FOR RELIEF**  
4 **[Breach Of Express Warranty]**

5 63. Plaintiff hereby realleges and incorporates by reference all paragraphs  
6 previously alleged herein. Plaintiff asserts this claim against each and every  
7 Defendant on behalf of herself and the Class.

8 64. Defendants expressly warranted that their "cuts and gravy" style pet food  
9 was suitable and safe for pet consumption.

10 65. Defendants also expressly warranted that "it manufacturer[s] the private-  
11 label wet pet-food industry's most comprehensive product program with the highest  
12 standards of quality."

13 66. Plaintiff and the Class were induced by Defendants' marketing,  
14 advertising, promotion and labeling of the pet food as suitable "food" to rely upon  
15 such express warranty, and, in fact, relied upon the untrue warranty in purchasing  
16 the recalled pet food and feeding it to their pets.

17 67. Plaintiff and the Class were damaged as a proximate result of  
18 Defendants' breach of their express warranty.

19 **SIXTH CLAIM FOR RELIEF**  
20 **[Breach Of Implied Warranty]**

21 68. Plaintiff hereby realleges and incorporates by reference all paragraphs  
22 previously alleged herein. Plaintiff asserts this claim against each and every  
23 Defendant on behalf of herself and the Class.

24 69. Defendants are merchants under section 2-104 and 2-314 of the Uniform  
25 Commercial Code.

26 70. Through their marketing, advertising, promotion and labeling of their  
27 "cuts and gravy" style pet food, Defendants impliedly warranted that such pet food  
28 was fit for the ordinary purpose for which it was intended, including to safely  
nourish pets with risk of illness or death, pursuant to section 2-314 of the Uniform

1 Commercial Code.

2 71. Through their marketing, advertising, promotion and labeling,  
3 Defendants knew that Plaintiff and the Class would purchase their pet food for the  
4 ordinary purpose of providing nourishment to their pets.

5 72. Defendants manufactured, distributed, marketed, advertised, promoted  
6 and sole their pet food for the ordinary purpose for which it was purchased by  
7 Plaintiff and the Class.

8 73. Plaintiff and the Class relied upon Defendants' representations and  
9 warranties, and purchased and used Defendants' pet food for the ordinary purpose  
10 for which it was sold.

11 74. Defendants' pet food purchased by Plaintiff and the Class were unfit for  
12 their ordinary purpose when sold. Such food was sold while presenting a risk of  
13 risk of illness or death to pets. Defendants have accordingly breached the implied  
14 warranty of merchantability by selling such unfit pet food.

15 75. Plaintiff and the Class were damaged as a proximate result of  
16 Defendants' breach of warranty.

17 **PRAYER FOR RELIEF**

18 **WHEREFORE**, Plaintiff, on behalf of herself and all others similarly  
19 situated, prays for judgment against Defendants as follows:

- 20 1. For an order certifying the Class under Rule 23 of the Federal Rules of  
21 Civil Procedure and appointing Plaintiff and her counsel of record to  
22 represent the Class;
- 23 2. For restitution, disgorgement and/or other equitable relief as the Court  
24 deems proper;
- 25 3. That pursuant to sections 17203 and 17204 of the Business and  
26 Professions Code, Defendants be permanently enjoined from  
27 performing or proposing to perform any of the aforementioned acts of  
28 unfair, unlawful and fraudulent business practices;

4. For compensatory damages sustained by Plaintiff and all others similarly situated as a result of Defendants' unlawful acts and conduct;
5. For punitive damages pursuant to Civil Code § 1780(a)(4);
7. For a permanent injunction prohibiting Defendants from engaging in the conduct and practices complained of herein;
8. For pre-judgment and post-judgment interest;
9. For reasonable attorneys' fees and costs of suit, including expert witness fees; and
10. For such other and further relief as this Court may deem just and proper.


**JURY DEMAND**

To the full extent available, Plaintiff demands a trial by jury.

Dated: March 26, 2007

**WEXLER TORISEVA WALLACE LLP**

By

  
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*Attorneys for Plaintiff and the Class*

## **Exhibit B**

---

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
KNOXVILLE DIVISION**

<b>LIZAJEAN HOLT,</b>	)	
	)	
<b>Individually, and on behalf of similarly</b>	)	
<b>situated persons,</b>	)	
	)	<b>No. _____</b>
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Class action</b>
	)	
<b>MENU FOODS, INC.,</b>	)	<b>JURY DEMAND</b>
	)	<b>CLASS ACTION</b>
<b>Defendant.</b>	)	

**CLASS ACTION COMPLAINT**

**I. Class Action**

1. Plaintiff, individually and as representative of a Class of similarly situated persons more defined below, brings suit against the named Defendant for offering for sale and **selling** to Plaintiff and Class members pet food and food products – “cut and gravy” pet products – formally **recalled** on March 16, 2007. Defendant is a corporation doing business and operating in the United States. Defendant recalled cat and dog food products that are sold under numerous brands by several national chain stores in Tennessee and other States in the United States. The pet food products were produced by Defendant(s), a private label manufacturer, labeled by the Defendant, and then distributed and ultimately sold to Plaintiff, Class Members, and others. Defendant issued or caused to be issued a press release announcing the recall, and the United States Food and Drug Administration issued a press release the same day. These pet food products were intended to be placed in the stream of commerce and distributed and offered for sale



and sold to Plaintiff and purchasers in Tennessee and the United States and fed to their pets, cats and dogs.

## **II. Jurisdiction and Venue**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1332 and subsection (d), and the Class Action Fairness Act of 2005, Pub. L.109-2 (Feb. 18, 2005); and over supplemental state law claims pursuant to 28 U.S.C. §1367.

3. Venue is proper in this Court and judicial district pursuant to 28 U.S.C. §1391 and/or Pub. L.109-2 because a part or substantial part of the events or omissions giving rise to the claim occurred in this judicial district, or a substantial part of property that is the subject of the action is situated in this judicial district.

4. In this judicial district, Plaintiff purchased the recalled pet food product made by or for Defendant, and her pet ate or consumed it. Thousands of other consumers/customers – including Plaintiff and other Class Members – purchased the recalled or contaminated products in this judicial district from retailers that Defendant, its agents, affiliates, or others it or they controlled sold or made available to them. In turn, retailers or others sold these recalled products to the general public, including Plaintiff, Class members and other purchasers. These products were purchased for consumption by the pets of Plaintiff and the Class members. Defendant made or caused these products to be offered for sale and sold to the public, including Plaintiff.

5. Rule 23 of the Federal Rules of Civil Procedure applies to class actions as well.

## **III. Plaintiff**

6. At all times material hereto, Plaintiff Lizajean Holt was and is a citizen of the State of Tennessee and the United States and resides in Knox County, Tennessee.

**IV. Plaintiff's Purchase(s)/Defendant's Recall**

7. Plaintiff purchased recalled brands of Pet Pride and Iams pet food from a national chain grocery store, Kroger, operating in Knox County, Tennessee. Kroger, like other retailers, did not alter the product produced by the Defendant in any way prior to selling it to Tennessee consumers and other consumers throughout the United States.

8. Without knowing that Defendants would recall the product after it was offered for sale and sold to her, Plaintiff purchased and fed the product(s) to her cat, her pet. Her pet became lethargic and began drinking large amounts of water and Plaintiff discontinued feeding the Defendant's products to her cat prior to the recall notice. Plaintiff and thousands of other consumers will now face veterinary bills to have their pets evaluated for kidney damage.

9. Before her purchase, Defendant never warned Plaintiff that the pet food product that she purchased for feeding her pet may or would cause it have health problems or concerns or that she would have to take her pet to a veterinarian due to a health concern relating to or resulting from the tainted pet food.

10. On or on about March 16, 2007, Defendant issued a recall for certain pet food for cats and dogs that it manufactured in plants that it controlled, owned, operated, or managed in the United States.

11. Defendant's business consists substantially of providing private label pet foods at its plants or pet foods under other brands, not its own. In turn, Defendant's

products are sold under a variety of labels or brands listed on its website as of March 17, 2007 and set forth below.

12. The product that Plaintiff purchased at a Kroger in Knoxville was a product recalled by Defendant.

13. After Plaintiff purchased the pet food and fed it to her cat, she learned about the recall and the actual or potential problems and concerns from purchasing and feeding the product to her pet.

14. Plaintiff bought the product(s) for their intended purposes: to feed her pet.

15. Defendant placed these pet products in the stream of commerce in Tennessee and elsewhere expecting that consumers such as Plaintiffs, the Class members, and the general public would feed these products to their pets.

#### **V. Defendant, Its Business, and the Recall**

16. At all times material hereto, Defendant Menu Foods, Inc. was and is a New Jersey corporation with its principal place of business in the State of New Jersey, specifically located at 9130 Griffith Morgan Lane, Pennsauken NJ 08110. Defendant is ultimately owned or controlled by Menu Foods Income Group, an Ontario based legal entity. Some of Defendant's high managerial or officers or agents with substantial authority are also high managerial officers or agents of Menu Foods Income Group. Defendant may be served through the Secretary of State for Tennessee or as provided by law.

17. Defendant Menu Foods, Inc. owns, controls, is related to or an affiliate of a firm with plants where the pet food is manufactured or processed that are located in the United States. These plants are located in Emporia, Kansas and, Pennsauken, New

Jersey, the place of manufacture where the pet products were recalled, and/or at other locations in the United States.

18. Defendant is the leading North American private label/contract manufacturer of wet pet food products sold by supermarket retailers, mass merchandisers, pet specialty retailers, and other wholesale and retail outlets, including Wal-Mart, Safeway, Kroger, PetSmart, Inc., Giant Food, and other large retail chains, and has provided pet food products to or for Proctor & Gamble, Inc. It produces hundreds of millions of containers of pet food annually.

19. Defendant has manufactured or produced pet food for private labels for about 17 of the 20 leading retailers in the United States.

20. Defendant's business includes manufacturing, producing, distributing, or selling cat food under various brands or labels, and/or for third party firms, including: America's Choice, Preferred Pets, Authority, Best Choice, Companion, Compliments, Demoulus Market Basket, Eukanuba, Fine Feline Cat, Food Lion, Food Town, Giant Companion, Hannaford, Hill Country Fare, Hy-Vee, Iams, Laura Lynn, Li'l Red, Loving Meals, Meijer's Main Choice, Nutriplan, Nutro Max Gourmet Classics, Nutro Natural Choice, Paws, Pet Pride, President's Choice, Priority, Sav-a-Lot, Schnucks, Science Diet Feline Savory Cuts Cans, Sophsitacat, Special Kitty US, Springfield Prize, Sprout, Total Pet, Wegmans, Western Family, White Rose, and Wynn Dixie.

21. Defendant's business includes manufacturing, producing, distributing, or selling dog food under various brands or labels, and/or for third party firms, including: America's Choice, Preferred Pets, Authority, Award, Best Choice, Big Bet, Big Red, Bloom, Bruiser, Cadillac, Companion, Demoulus Market Basket, Eukanuba, Food Lion,

Giant Companion, Great Choice, Hannaford, Hill Country Fare, Hy-vee, Iams, Laura Lynn, Li'l Red, Loving Meals, Meijer's Main Choice, Mixables, Nutriplan, Nutro Max, Nutro Ultra, Nutro, Ol'Roy US, Paws, Pet Essentials, Pet Pride – Good & Meaty, President's Choice, Price Chopper, Priority, Publix, Roche Brothers, Sav-a-Lot, Schnucks, Shep Dog, Sprout, Statler Bros, Total Pet, Western Family, White Rose, Wynn Dixie, and Your Pet.

22. On Defendant's website as of March 17, 2007, it listed by brands, the size of the container or pouch, the dates of manufacture, and the products subject to recall. Thus, each container or pouch and size of each brand or label listed – subject to the recall above – was noted specifically on its web site. Thus, a 3 ounce can or pouch of Pet Pride Pouch Mixed Grill 24 X 3 with sale by date of March 8, 2009, with a specified "UPC" number was one of about 150 separate Pet Pride labeled cat food that Defendant recalled. The other brands also generally listed numerous separate pouches or containers bearing the major private label or brand with a further sub-description similar to the manner described above, by brand or label.

23. After reports or complaints from pet owners about symptoms – such as vomiting or lethargy – suggesting kidney failure in their dogs and cats and/or after reports of deaths of certain pets, from or through its Canadian office or affiliation, Defendant caused or issued a recall of certain specified pet products, reportedly totaling between 40 and 60 million cans.

24. Defendant also advised a governmental agency of the United States about the recall and certain events leading to the recall, namely the Food and Drug Administration (FDA).

25. Defendant produces over 1,000,000,000 pouches or containers of pet food products each year, a substantial portion of which is sold or offered for sale in Tennessee or for Tennesseans who purchase the products for their pets. Many consumers who fear for the health of their pets will no longer have the product because it has been fed to the pets.

26. Defendant knows or should know that national, regional, and/or local distributors will distribute these finished pet food products that it manufactures or processes to retailers to offer them for sale in Tennessee to Tennesseans who purchase and buy them for their pets for consumption by their pets in the State of Tennessee and in this judicial district.

27. Defendant knows or understands that millions or tens of millions of cans or pouches of the pet food products that it manufactures or produces will be advertised, promoted, and sold in Tennessee and this judicial district, including a significant or substantial part of the recalled pet food.

28. Defendant knows or understands that the promotion and advertising of pet food produced at its plants in part targets consumers and customers in Knox County, in this judicial district, in the State of Tennessee, regionally, or nationally.

29. Defendant makes or produces the pet food products in its plants with a purpose or design that consumers and customers will purchase them, regardless of brand or label name, place of purchase, or place where pets actually consume them.

30. Defendant makes or produces for third parties well-known, lesser known, and/or premium or discount brands or labels of pet foods and knows that customers and consumers will ultimately purchase them to feed to their pets.

31. Defendant desires that consumers and others who purchase or consider purchasing a pet food product made or produced in one of its plants, by whatever label or brand, believe that the pet food product is safe for their pets to eat.

32. In the last few days, Defendant has recalled specified pet food products that consumers and customers purchased from a time beginning about December 3, 2006 and concluding about March 6, 2007.

33. Class members and others have purchased the pet products that were recalled across the United States, in Tennessee, and in this judicial district.

34. Class members and others who purchased or fed Defendant's products to their pets did so in this judicial district, in Tennessee, and in the United States.

35. Some class members or others have already taken their pets to a veterinarian for treatment or diagnosis related to their pets eating the recalled pet food and more will do so as word of the recall spreads. For instance, the Knoxville NewsSentinel carried a prominent story about the recall and the potential dangers to the pets of East Tennessee citizens in its Sunday, March 18, 2007 edition.

36. Class members have suffered and will suffer injuries, losses, or damage as a result of the recall and/or feeding their animals the food that was recalled.

37. There have been other reported incidents of pet food being recalled as a result of possible or actual concerns or problems with the pet food and its or their effects on pets. Defendant knew or should have known about the risks and possible injury.

#### **VI. Plaintiff, Class Members, and Others' Losses, Damages, and Injuries**

38. As a result of their purchases of the pet food recalled or subject to recall, set forth above, Plaintiff, Class members, and others have suffered and will suffer a loss,

damage, injury, and sustained damages, including consequential and incidental damages, such as costs of purchasing the contaminated food product and replacing it with a safe food product, including sale tax or a similar tax, costs of making an additional trip to a retail store to purchase safe, non-contaminated pet food, the price of postage to secure a refund offered by Defendant, the cost of veterinarians, treatment, medicines and the trip(s) to make such visits for diagnosis and treatment, and otherwise.

#### **VII. Breach of Warranties & Remedies**

39. Defendant breached express warranties to Plaintiff, the Class, and others, and violated the Uniform Commercial Code.

38. Defendant breached implied warranties to Plaintiff, the Class, and others, and violated the Uniform Commercial Code.

40. Defendant breached the implied warranty of fitness for a particular purpose by claiming certain of the pet food that it manufactured or produced and was recalled were fit and safe for consumption by pets and thereby violated the Uniform Commercial Code.

41. Defendant breached the implied warranty of merchantability. In fact, the pet food subject to recall and purchased or used by Plaintiff, the Class, and others was not merchantable. This breach violated the Uniform Commercial Code.

42. Plaintiffs are entitled to the remedies for breach authorized by the Uniform Commercial Code and other law.

#### **VIII. Negligence**



43. Defendants owed Plaintiff and the Class a duty to only offer safe, non-contaminated products for consumption by pets and offered for sale and sold in the stream of commerce.

44. Though its failure to exercise due care Defendant owed Plaintiff, the class, and others, Defendant was negligent in producing, processing, manufacturing, and offering for sale the recalled pet food and pet food products it offered for sale and sold to Plaintiff, the class, and others.

45. Defendant failed to use sufficient quality control, to do adequate testing, to perform proper manufacturing, production, or processing, or failed to take sufficient measures to prevent the pet food products that were recalled from being offered for sale, sold, or fed to pets.

46. Defendant knew or should have known that the pet food that was recalled presented an unacceptable risk to the pets of the Plaintiff, the Class, and others and would result in damage that was foreseeable and reasonably avoidable.

47. The loss, damage, and injuries were foreseeable.

48. Defendant's negligence proximately caused the loss, damage, injury, and damages to Plaintiff, the Class, and others.

#### **IX. Statutory Unfair or Deceptive Trade Practices Act**

49. Plaintiff, the Class, purchasers, others, and Defendant are each a "person" within the meaning of Tenn. Code Ann. §47-18-103.

50. Defendant's offer for sale or sale of their recalled pet food products is in or affects trade or commerce in Tennessee.

51. Defendant impliedly represented to the public, Plaintiff, the Class and others that its pet food products were safe for consumption by their pets and could be safely purchased.

52. In fact, Defendant recalled or caused to be recalled millions of containers or pouches of pet food because it risked the health and well-being of consumers, customers, Plaintiff, purchasers, the Class, and others.

53. Defendant violated Tenn. Code Ann. §47-18-104 (a) and sub-parts of (b) by placing these unsafe pet food products in the stream of commerce in Tennessee.

54. Each Plaintiff, Class member, and other person adversely affected in Tennessee has suffered an ascertainable loss of money or property due to a violation of the Consumer Protection Act.

55. Plaintiffs brings a claim for a violation of the Tennessee Consumer Protection Act under Tenn. Code Ann. §47-18-109, including the ascertainable loss of money or property by each such person.

**X. Rule 23**

56. Plaintiffs ask this Court to certify the following Class:

All persons in the United States who purchased or fed his, her, or their cat(s) or dog(s) pet food produced or manufactured by Defendant that was or will be recalled by the Defendant, including that produced from December 3, 2006 up to and including March 6, 2007.

57. Plaintiff is a member of the Class, sues as a representative party on behalf of all, and avers that the class is so numerous that joinder of all members is impracticable.

58. There are questions of law or fact common to the Class. These common questions include but are not limited to the following:

- a. Whether Defendant sold pet food products that were recalled or subject to a recall?
- b. Whether Defendant advertised, represented, or held itself out as producing or manufacturing a pet food product that was safe for pets of the class members?
- c. Whether Defendant expressly warranted these products?
- d. Whether Defendant impliedly warranted these products for fitness for a particular purpose?
- e. Whether Defendant impliedly warranted these products for merchantability?
- f. Whether Defendant purported to disclaim any express warranty?
- g. Whether Defendant purported to disclaim any implied warranty?
- h. Whether any limitation on warranty fails to meet its essential purpose?
- i. Whether Defendant intended that the pet food products be purchased by Plaintiff, Class members, or others?
- j. Whether Defendant intended or foresaw that Plaintiff, class members, or others would feed their pet food products to their pets?
- k. Whether Defendant recalled the pet food products?
- l. Whether Defendant was negligent in manufacturing or processing the pet food products?
- m. Whether using the products as intended – to feed their pets – resulted in loss, injury, damage, or damages to the Class?
- n. Whether Defendant's negligence proximately caused loss or injury to damages?
- o. Whether Class members suffered direct losses or damages?
- p. Whether Class members suffered indirect losses or damages?

q. Whether Defendants' acts or practices violated state Deceptive Trade Practices Acts?

59. The claims or defenses of the representative parties are typical of the claims or defenses of the Class.

60. The representative parties will fairly and adequately protect the interests of the Class.

61. Prosecuting separate actions by individual members of the Class would create a risk of either –

a. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for defendants, the parties who oppose the class, or

b. Questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

c. Few, if any, Class members have an interest in individually controlling the prosecution of separate actions;

d. Plaintiff is unaware of any litigation concerning the controversy already commenced by members of the class;

e. It is desirable to concentrate the litigation of the claims in this forum;

f. No unusual difficulties are likely to be encountered in the management of a class action.

62. The undersigned Attorneys for Plaintiff and the Class request that the Court appoint them to serve as class counsel first on an interim basis and then on a permanent basis.

63. They will fairly and adequately represent the interests of the class, have identified or investigated the Class's potential claims, are experienced in handling class actions, other complex litigation, and consumer claims of the type asserted in the action, know the applicable law, will commit sufficient resources to represent the class, and are best able to represent the Class.

64. Plaintiff requests this Court to certify this Class in accordance with Rule 23 and the Class Action Fairness Act of 2005.

## **XII. Jury Demand**

65. The Class demands a jury trial on all issues triable by a jury.

## **XIII. Prayer for Relief**

Wherefore, premises considered, Plaintiff prays that the Court grant the following relief:

1. That process issue and Defendant be served. (Plaintiff's counsel will first provide Defendant's agent, Corporation Trust Company, 820 Bear Tavern Road, West Trenton, NJ 08628 with a Notice of Lawsuit by mail pursuant to the Federal Rules)
2. That as soon as practical, the Court certify a Class, defined herein, or modified as appropriate under the facts and law.
3. That the Court find that Plaintiff has satisfied Rule 23's and federal law's requirements for certifying a Class.

4. That the Court find that Defendant manufactured or processed the pet food products that were sold or offered to sale to Plaintiff and the Class.
5. That the Court find that Defendant intended Plaintiff and Class members to believe that the pet foods sold were fit and safe for consumption by their pets.
6. That a trial be held and Defendants be held liable to the Class for – breach of warranty, negligence, and under state statutes prohibiting deceptive trade practices.
7. That the Class be awarded an amount sufficient for direct damages occasioned by Defendants' acts and practices.
8. That the Class be awarded an amount sufficient for indirect, consequential, and incidental damages occasioned by Defendant's acts and practices.
9. That the Class be awarded treble damages or special damages authorized by state statutes prohibiting deceptive trade practices, depending upon the State where the Class Member lives.
10. That the Court award reasonable attorney's fees and costs and expenses recoverable under law.
11. That the Court order such other, further relief as the case requires and justice demands.

Dated: March 19, 2007.

Respectfully submitted,

/s/ A. James Andrews  
A. James Andrews, BPR # 15772  
905 Locust Street  
Knoxville, Tennessee 37902  
(865) 660-3993  
Fax: (865) 523-4623

/s/Perry A. Craft

Perry A. Craft, BPR # 6057  
Craft & Sheppard, PLC  
The Shiloh Building  
214 Centerview Drive  
Suite 233  
Brentwood, Tennessee 37027  
(615) 309-1707  
(615) 309-1717 (fax)

/s/Nichole Bass

Nicole Bass, BPR # 021383  
905 Locust Street  
Knoxville, Tennessee 37902  
(865) 310-6804

Cost Bond

We are sureties for costs not to exceed \$1,000.

/s/ A. James Andrews

## **Exhibit C**

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U. S. DISTRICT COURT  
WESTERN DISTRICT ARKANSAS  
FILED

MAR 21 2007

CHRIS R. JOHNSON, CLERK

**DEPUTY CLERK**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

**CHARLES RAY SIMS and PAMELA SIMS,  
Individually and on behalf of all others  
similarly situated,**

**Plaintiffs,**

## VERSUS

**MENU FOODS INCOME FUND,  
MENU FOODS MIDWEST CORPORATION,  
MENU FOODS SOUTH DAKOTA INC.,  
MENU FOODS, INC., MENU FOODS  
HOLDINGS, INC.,**

**Defendants.**

CIVIL ACTION NO. 07-5053

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## CLASS ACTION COMPLAINT

NOW INTO COURT, through undersigned counsel, come Plaintiffs, CHARLES RAY SIMS and PAMELA SIMS (hereinafter collectively “Plaintiff,” “Plaintiffs”, or “SIMS”), major residents in the State of Arkansas, individually and on behalf of all others similarly situated, who file this Class Action Complaint pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), seeking monetary relief for themselves and the class they seek to represent. This suit is brought against MENU FOODS INCOME FUND, MENU FOODS MIDWEST CORPORATION, MENU FOODS SOUTH DAKOTA INC., MENU FOODS, INC., and MENU FOODS HOLDINGS, INC., representing as follows:

### **GENERAL ALLEGATIONS**

1. This is an action for damages relating to Defendants' design, manufacture, sale, testing, marketing, advertising, promotion and/or distribution of unsafe canned and foil pouched dog and cat food.

2. This Court has jurisdiction over the subject matter and Defendants in this case pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between Plaintiffs and Defendants and the matter in controversy involves a request that the Court certify a class action.

3. Venue is proper in this district under 28 U.S.C. § 1391(b)(2) because a substantial part of the acts, conduct and damages complained of occurred in this district as Plaintiffs' residency is in Benton County, Arkansas, within the geographical boundaries of this Court.

### **PARTIES, JURISDICTION AND VENUE**

4. Defendant MENU FOODS INCOME FUND is an unincorporated company with its principal place of business in Ontario, Canada. It is doing business in the State of Arkansas. Jurisdiction is appropriate pursuant to the Arkansas Long Arm Statute, Sec. 16-4-101, and service may be effected through the Hague Convention on service abroad of judicial and extrajudicial documents and civil or commercial matters (The Hague Convention) at 8 Falconer Drive, Streetsville, Ontario, Canada L5N 1B1.

5. MENU FOODS MIDWEST CORPORATION is a Delaware corporation and may be served through its registered agent for service, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware.

6. Defendant MENU FOODS SOUTH DAKOTA INC. is a Delaware corporation and may be served through its registered agent for service, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware.

7. Defendant MENU FOODS HOLDINGS, INC. is a Delaware corporation and may be served through its registered agent for service, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware.

8. Defendant MENU FOODS, INC. is a New Jersey corporation and may be served through its registered agent for service, Corporation Trust Company, 820 Bear Tavern Road, West Trenton, New Jersey.

9. Defendants MENU FOODS INCOME FUND, MENU FOODS MIDWEST CORPORATION, MENU FOODS SOUTH DAKOTA INC., MENU FOODS, INC., and MENU FOODS HOLDINGS, INC. are hereinafter referred to collectively as "Defendants" or "MENU."

10. Upon information and belief, Defendants MENU FOODS MIDWEST CORPORATION, MENU FOODS SOUTH DAKOTA INC., MENU FOODS, INC., and MENU FOODS HOLDINGS, INC. are wholly owned subsidiaries of MENU FOODS INCOME FUND, a business entity registered in and headquartered in Ontario, Canada. MENU provides principal development, exporting, financing, holding company, marketing, production, research and servicing for MENU animal food products in the United States, including canned and foil pouched dog and cat food. MENU FOODS INCOME FUND is one of the largest animal food producing companies in the world, and MENU operates as one of the largest animal food companies in the United States,

whether measured by number of products produced and sold, revenues, or market capitalization.

11. At all times herein mentioned, Defendants were engaged in the business of the manufacturing, packaging, marketing, distribution, promotion, and sale of dog and cat canned and foil pouched food products (hereinafter the "Product"), and at all times herein relevant, were engaged in the promotion and marketing of animal food products, including canned and foil pouched dog and cat food.

12. Plaintiff CHARLES RAY SIMS resides at 2705 W. Dogwood, Rogers, Arkansas. At all times material to this complaint, he was a resident of Rogers, in the State of Arkansas.

13. Plaintiff PAMELA SIMS resides at 2705 W. Dogwood, Rogers, Arkansas. At all times material to this complaint, she was a resident of Rogers, in the State of Arkansas.

14. Plaintiffs CHARLES RAY SIMS and PAMELA SIMS were the owners of a family dog ("ABBY") at all times material to this complaint.

15. This Court has diversity jurisdiction and jurisdiction pursuant to the Class Action Fairness Act of 2005.

#### **CLASS ACTION ALLEGATIONS**

16. Defendant MENU manufactured, distributed, marketed and sold canned and foil pouched dog and cat food to consumers in the United States. These consumers compose the putative class in this action and have rights that are substantially the same.

17. Defendant MENU has issued a recall for over 90 brands of dog and cat canned and foil pouched food in the United States since March 16, 2007, translating to in excess of sixty million cans and pouches of dog and cat food recalled throughout the United States.

18. The consumers composing the putative class in this action consist of: (1) all persons or entities who purchased Menu Food brands at any time and disposed of or will not use the products based on publicity surrounding the safety and recall of the products; (2) all persons or entities who purchased Menu Foods products and fed products to their pets on or since December 6, 2006; and (3) all persons or entities who purchased Menu Food products from wholesale distributors on or since December 6, 2006 to the present.

19. The consumers composing the putative class are so numerous that joinder of all members is impracticable; the questions of law or fact are common to all members of the class; the claims and defenses of Plaintiff SIMS are typical of the claims or defenses of the class; and Plaintiff SIMS will fairly and adequately protect the interests of the class.

20. While the exact number and identities of the members of the class are unknown at this time, it is asserted that the class consists of thousands of persons. Upon further identification of the recipient class, class members may be notified of the pendency of this action by published class notice and/or by other means deemed appropriate by the Court.

21. The sheer number of consumers composing the putative class are so numerous as to make separate actions by each consumer impractical and unfair and a

class action certification represents the superior method for the fair and efficient adjudication of the controversy in question.

22. There is no plain, speedy or adequate remedy other than by maintenance of this class action because Plaintiffs SIMS are informed and believe that the economic damage to each member of the class makes it economically unfeasible to pursue remedies other than through a class action. There would be a failure of justice but for the maintenance of this class action.

### **FACTUAL BACKGROUND**

23. Plaintiff's dog, ABBY, died as a direct result of the ingestion of canned and/or foil pouched dog food manufactured and distributed in the United States by Defendants.

24. Defendants distributed their "Cuts and Gravy" canned and foil pouched dog and cat food product by misleading users about the product and by failing to adequately warn the users of the potential serious dangers, which Defendants knew or should have known, might result from animals consuming its product. Defendants widely and successfully marketed Defendants' canned and foil pouched dog and cat food products throughout the United States by, among other things, conducting promotional campaigns that misrepresented the safety of Defendants' products in order to induce widespread use and consumption.

25. As a result of claims made by Defendants regarding the safety and effectiveness of Defendants' canned and foil pouched dog and cat food products, Plaintiff SIMS fed their dog, ABBY, canned dog food distributed under the format "Cuts and Gravy", said product being manufactured and distributed by Defendants.

26. As a result of Plaintiffs SIMS feeding their dog, ABBY, the Product manufactured and distributed by Defendants, their dog developed severe health problems, including but not limited to anorexia, lethargy, diarrhea and vomiting.

27. Plaintiffs SIMS took their dog, ABBY, to Dr. Eric P. Steinlage, at All Dogs Clinic, Rogers, Arkansas, who performed tests and surgery on the dog.

28. Dr. Eric P. Steinlage determined that Defendants' Product was the cause of the dog's kidney failure and the dog died on March 16, 2007.

29. Had Plaintiff SIMS known the risks and dangers associated with Defendants' canned and foil pouched dog food product sold under the format "Cuts and Gravy", or had Defendants disclosed such information to Plaintiff, he would not have fed Defendants' product to their dog, ABBY, and the dog would not have suffered subsequent health complications and ultimately died before the age of two.

30. Upon information and belief, as a result of the manufacturing and marketing of Defendants' canned and foil pouched dog and cat food products, Defendants have reaped huge profits; while concealing from the public, knowledge of the potential hazard associated with the ingestion of Defendants' canned and foil pouched dog and cat food products.

31. Defendants failed to perform adequate testing in that the adequate testing would have shown that Defendants' canned and foil pouched dog and cat food products produced serious side effects with respect to which Defendants should have taken appropriate measures to ensure that its defectively designed product would not be placed into the stream of commerce and/or should have provided full and proper

warnings accurately and fully reflecting the scope and severity of symptoms of those side effects should have been made.

32. Defendants' had notice and knowledge as early as February 20, 2007, that their Product presented substantial and unreasonable risks, and possible death, to animals consuming the Product. As such, said consumers' dogs and cats, including Plaintiff's dog, ABBY, were unreasonably subjected to the risk of illness or death from the consumption of Defendants' Product.

33. Despite such knowledge, Defendants, through their officers, directors, partners and managing agents for the purpose of increasing sales and enhancing its profits, knowingly and deliberately failed to remedy the known defects of Defendants' Product in a timely manner, failed to conduct testing in a timely manner, and failed to warn the public in a timely manner, including Plaintiff, of the serious risk of illness and death occasioned by the defects inherent in Defendants' Product.

34. Defendants and their officers, agents, partners and managers intentionally proceeded with the manufacturing, distribution, sale and marketing of Defendants' Product, knowing that the dogs and cats ingesting the Defendants' Product would be exposed to serious potential danger, in order to advance their own pecuniary interests.

35. Defendants' conduct was wanton and willful, and displayed a conscious disregard for the safety of the Product and particularly of the damage it would cause pet owners like the SIMS, entitling these Plaintiffs to exemplary damages.

36. Defendants acted with conscious and wanton disregard of the health and safety of Plaintiff's dog, ABBY, and Plaintiff requests an award of additional damages for the sake of example and for the purpose of punishing such entities for their conduct,



in an amount sufficiently large to be an example to others, and to deter Defendants and others from engaging in similar conduct in the future. The above-described wrongful conduct was done with knowledge, authorization, and ratification of officers, directors, partners and managing agents of Defendants.

37. As a direct and proximate result of Defendants' negligence as described herein, Plaintiff SIMS sustained damages in the loss of their family pet.

**AS AND FOR A FIRST CAUSE OF ACTION SOUNDING IN  
STRICT PRODUCT LIABILITY - FAILURE TO WARN**

38. Plaintiff repeats and incorporates by reference each and every paragraph of this complaint as though set forth in full in this cause of action.

39. Defendants manufactured, marketed, distributed, and supplied Defendants' Product to distribution centers throughout the United States. As such, Defendants had a duty to warn the public, including Plaintiff, of the health risks and possible death associated with using Defendants' Product.

40. Defendants' Product was under the exclusive control of Defendants, and was sold without adequate warnings regarding the risk of serious injury and other risks associated with its use.

41. As a direct and proximate result of the defective condition of Defendants' Product as manufactured and/or supplied by Defendants, and as a direct and proximate result of negligence, gross negligence, willful and wanton misconduct, or other wrongdoing and actions of Defendants described herein, Plaintiff suffered damages.

42. Upon information and belief, Defendants knew of the defective nature of Defendants' Product but continued to design, manufacture, market, and sell it so as to maximize sales and profits at the expense of animal health and safety, in knowing,

conscious, and deliberate disregard of the foreseeable harm caused by Defendants' Product and in violation of their duty to provide an accurate, adequate, and complete warning concerning the use of Defendants' Product.

43. Defendants failed to warn the public or Plaintiff in a timely manner of the dangerous propensities of Defendants' Product, which dangers were known or should have been known to Defendants, as they were scientifically readily available.

44. Defendants knew and intended that Defendants' Product would be distributed through the United States without any inspection for defects.

45. Defendants also knew that veterinary clinics, pet food stores, food chains and users such as Plaintiff would rely upon the representations and warranties made by Defendants on the product labels and in other promotional and sales materials upon which the Plaintiff did so rely.

46. As a direct and proximate result of the Defendants' distribution of the product without adequate warnings regarding the health risks to animals, the Plaintiffs suffered damage as previously alleged herein, including ascertainable economic loss, including the purchase price of Defendants' Product, out-of-pocket costs of veterinary medical tests and treatment for their dog, ABBY, out-of-pocket costs of disposal/burial fees after the death of their dog, ABBY, as well as the pecuniary value.

47. Defendants' conduct in the packaging, warning, marketing, advertising, promotion, distribution, and sale of Defendants' pet foods, was committed with knowing, conscious, and deliberate disregard for the rights and safety of consumers such as Plaintiffs' pets, thereby entitling Plaintiffs to punitive damages in an amount to be

determined at trial that is appropriate to punish Defendants and deter them from similar conduct in the future.

48. The damages resulting from the allegations asserted under this cause of action, exceed the district court's original jurisdictional limits as described in Section 4 of the Class Action Fairness Act of 2005.

**AS AND FOR A SECOND CAUSE OF ACTION SOUNDING IN  
STRICT PRODUCT LIABILITY – DEFECTIVE IN DESIGN OR MANUFACTURE**

49. Plaintiff repeats and incorporates by reference each and every paragraph of this complaint as though set forth in full in this cause of action.

50. Defendants were the manufacturers, sellers, distributors, marketers, and/or suppliers of Defendants' Product, which was defective and unreasonably dangerous to the Plaintiffs' pets.

51. Defendants' Product was sold, distributed, supplied, manufactured, marketed, and/or promoted by Defendants, and was expected to reach and did reach consumers without substantial change in the condition in which it was manufactured and sold by Defendants.

52. The Product was manufactured, supplied, and/or sold by Defendants and was defective in design or formulation in that when it left the hands of the manufacturers and/or sellers it was unreasonably dangerous in that its foreseeable risks exceeded the benefits associated with the designs and/or formulations of the Product.

53. Upon information and belief, Defendants actually knew of the defective nature of Defendants' Product but continued to design, manufacture, market, and sell it so as to maximize sales and profits at the expense of the public health and safety, in conscious disregard of the foreseeable harm caused by Defendants' Product.

54. At all times material to this action, the Product was designed, tested, inspected, manufactured, assembled, developed, labeled, sterilized, licensed, marketed, advertised, promoted, sold, packaged, supplied and/or distributed by Defendants in a defective and unreasonably dangerous condition in ways which include, but are not limited to, one or more of the following:

- a. When placed in the stream of commerce, the Product contained unreasonably dangerous design defects and was not reasonably safe and fit for its intended or reasonably foreseeable purpose or as intended to be used, thereby subjecting the dogs and cats of the consumers, including Plaintiff, to risks which exceeded the benefits of the Product;
- b. The Product was insufficiently tested;
- c. The Product caused serious illness, harmful side effects, and possible death that outweighed any potential utility;
- d. In light of the potential and actual risk of harm associated with ingestion of the Product by dogs and cats, a reasonable person who had actual knowledge of this potential and actual risk of harm would have concluded that the Product should not have been marketed, distributed or sold in that condition.

55. At all times material to this action, the Product was designed, tested, inspected, manufactured, assembled, developed, labeled, sterilized, licensed, marketed, advertised, promoted, sold, packaged, supplied and/or distributed, it was

expected to reach, and did reach, purchasers of the Product across the United States, including Plaintiff, without substantial change in the defective and unreasonably dangerous condition in which it was sold.

56. At all times, Plaintiff purchased the Product for its intended or reasonably foreseeable purpose.

57. As a direct, legal proximate and producing result of the defective and unreasonably dangerous condition of the Product, Plaintiff sustained damage, for which Plaintiff is entitled to recovery.

58. As a direct, legal, proximate and producing result of the defective and unreasonably dangerous condition of the Product, Plaintiff's dog, ABBY, was injured in health, strength and activity and subsequently died after having suffered physical injuries.

59. As a direct, legal, proximate and producing result of the defective and unreasonably dangerous condition of the Product, Plaintiff's dog, ABBY, required reasonable and necessary veterinary treatment and services and incurred expenses for which Plaintiff is entitled to damages, along with the expenses of disposal/burial of the family pet.

60. As a direct and proximate result of the design and manufacturing defects of Defendants' Product, Plaintiff suffered damages as previously alleged herein.

61. Defendants' aforementioned conduct was committed with knowing, conscious, and deliberate disregard for the rights and safety of consumers such as Plaintiff, including Defendants' knowingly withholding and/or misrepresenting information to the public, including Plaintiff, which information was material and relevant

to the harm in question, punitive damages in an amount to be determined at trial that are appropriate to punish Defendants and deter them from similar conduct in the future.

62. The damages resulting from the allegations asserted under this cause of action, exceed the district court's original jurisdictional limits as described in Section 4 of the Class Action Fairness Act of 2005.

**AS AND FOR A THIRD CAUSE OF ACTION,  
SOUNDING IN FRAUD**

63. Plaintiff repeats and incorporates by reference each and every paragraph of this complaint as though set forth in full in this cause of action.

64. At all material times, Defendants were engaged in the business of manufacturing, marketing, distributing, promoting, and selling Defendants' Product.

65. Defendants made misrepresentations of material facts to, and omitted and/or concealed material facts from, Plaintiff in the advertising, marketing, distribution and sale of Defendants' Product regarding its safety and use.

66. Defendants deliberately and intentionally misrepresented to, and omitted and/or concealed material facts from, consumers, including Plaintiff SIMS, that Defendants' Product was safe when ingested by dogs and cats. Such misrepresentations, omissions, and concealments of facts include, but are not limited to:

a. Failing to disclose, and/or intentionally concealing, the results of tests showing the potential health risks to dogs and cats associated with the use of Defendants' Product;

b. Failing to include adequate warnings with Defendants' Product about the potential and actual risks and the nature, scope, severity, and duration of serious adverse effects of Defendants' Product;

c. Concealing information regarding the known health risks to dogs and cats associated with Defendants' Product; and;

d. Concealing the known incidents of illnesses and death of dogs and cats, as previously alleged herein.

67. Defendants intentionally concealed facts known to them, as alleged herein, in order to ensure increased sales of Defendants' Product.

68. Defendants had a duty to disclose the foregoing risks and failed to do so, despite possession of information concerning those risks. Defendants' representations that Defendants' Product was safe for its intended purpose were false, as Defendants' Product was, in fact, dangerous to the health of and ultimately fatal to Plaintiff SIMS' dog, ABBY.

69. Defendants knew that their statements were false, knew of incidents of serious illnesses and deaths in dogs and cats, and knew that their omissions rendered their statements false or misleading.

70. Further, Defendants failed to exercise reasonable care in ascertaining the accuracy of the information regarding the safe use of Defendants' Product, and failed to disclose that Defendants' Product caused possible death in dogs and cats, among other serious adverse effects. Defendants also failed to exercise reasonable care in communicating the information concerning Defendants' Product to Plaintiff SIMS, and/or concealed facts that were known to Defendants.

71. Plaintiff SIMS was not aware of the falsity of the foregoing representations, nor was Plaintiff SIMS aware that one or more material facts concerning the safety of Defendants' Product had been concealed or omitted.

72. In reliance upon Defendants' misrepresentations (and the absence of disclosure of the serious health risks), Plaintiff SIMS fed Defendants' Product to their dog, ABBY. Had Plaintiff SIMS known the true facts concerning the risks associated with Defendants' Product, he would not have purchased the Product nor fed the Product to the family pet.

73. The reliance by Plaintiff SIMS upon Defendants' misrepresentations was justified because said misrepresentations and omissions were made by individuals and entities that were in a position to know the facts concerning Defendants' Product.

74. Plaintiff SIMS was not in a position to know the facts because Defendants aggressively promoted the use of Defendants' Product and concealed the risks associated with its use, thereby inducing Plaintiff SIMS to purchase Defendants' Product.

75. As a direct and proximate result of Defendants' misrepresentations, and/or concealment, Plaintiffs suffered damages as previously alleged herein.

76. Defendants' conduct in concealing material facts and making the foregoing misrepresentations, as alleged herein, was committed with conscious or reckless disregard of the rights and safety of consumers such as Plaintiff, thereby entitling Plaintiff to punitive damages in an amount to be determined at trial that is appropriate to punish Defendants and deter them from similar conduct in the future.

77. The damages resulting from the allegations asserted under this cause of action, exceed the district court's original jurisdictional limits as described in Section 4 of the Class Action Fairness Act of 2005.



**AS AND FOR A FOURTH CAUSE OF ACTION,  
SOUNDING IN IMPLIED WARRANTY OF FITNESS FOR  
A PARTICULAR PURPOSE AND IMPLIED WARRANTY  
OF MERCHANTABILITY**

78. Plaintiff repeats and incorporates by reference each and every paragraph of this complaint as though set forth in full in this cause of action.

79. Defendants manufactured, marketed, sold, and distributed Defendants' Product.

80. At the time Defendants marketed, sold, and distributed Defendants' Product for use by Plaintiff SIMS, Defendants knew of the purpose for which Defendants' Product was intended and impliedly warranted Defendants' Product to be of merchantable quality and safe and fit for such use.

81. Plaintiff SIMS reasonably relied on the skill, superior knowledge, and judgment of Defendants as to whether Defendants' Product was of merchantable quality and safe and fit for its intended use.

82. Due to Defendants' wrongful conduct as alleged herein, Plaintiff SIMS could not have known about the risks and side effects associated with Defendants' Product until after ingestion by Plaintiff SIMS' dog, ABBY.

83. Contrary to such implied warranty, Defendants' Product was not of merchantable quality and was not safe or fit for its intended use.

84. As a direct and proximate result of Defendants' breach of implied warranty, Plaintiff SIMS. suffered damages as previously alleged herein.

85. Defendants' aforementioned conduct was committed with knowing, conscious, and deliberate disregard for the rights and safety of consumers such as Plaintiff, thereby entitling Plaintiff to punitive damages in an amount to be determined at

trial that is appropriate to punish Defendants and deter them from similar conduct in the future.

86. The damages resulting from the allegations asserted under this cause of action, exceed the district court's original jurisdictional limits as described in Section 4 of the Class Action Fairness Act of 2005.

**AS AND FOR A FIFTH CAUSE OF ACTION  
SOUNDING IN BREACH OF EXPRESS WARRANTY**

87. Plaintiff repeats and incorporates herein by reference the allegations made in the above Paragraphs.

88. Defendants expressly warranted that the Product was safe and well accepted by dogs and cats and was safe for long-term use.

89. The Product does not conform to these express representations because the Product is not safe and has high levels of serious, life-threatening side effects.

90. As a direct and proximate result of the breach of said warranties, Plaintiff was damaged, and he is therefore entitled to damages as described herein.

91. The damages resulting from the allegations asserted under this cause of action, exceed the district court's original jurisdictional limits as described in Section 4 of the Class Action Fairness Act of 2005.

**AS AND FOR A SIXTH CAUSE OF ACTION  
SOUNDING IN NEGLIGENCE**

92. Plaintiff repeats and incorporates by reference each and every paragraph of this complaint as though set forth in full in this cause of action.

93. Defendants owed a duty to consumers of Defendants' Product, including the Plaintiff, to use reasonable care in designing, testing, labeling, manufacturing,

marketing, supplying, distribution and selling Defendants' Product, including a duty to ensure that Defendants' Product did not cause the dogs and cats ingesting the Product to suffer from unreasonable, unknown, and/or dangerous side effects.

94. Defendants failed to exercise reasonable care in warning about, designing, testing, labeling, manufacture, marketing, selling and/or distributing of Defendants' Product and breached their duties to Plaintiff in that, and not by way of limitation, they did not warn of the known risks associated with the ingestion of Defendants' Product and did not exercise an acceptable standard of care, i.e., what a reasonably prudent manufacturer or seller would have known and warned about.

95. Moreover, the product lacked sufficient warnings of the hazards and dangers to users of said Product, and failed to provide safeguards to prevent the injuries sustained by Plaintiff's dog, ABBY. Defendants failed to properly test Defendants' Product prior to its sale, and as a result subjected users to an unreasonable risk of injury when this Product was used as directed and recommended.

96. Defendants additionally breached their duty and were negligent in their actions, misrepresentations, and omissions toward Plaintiff, in part, in the following ways:

- a. Failed to exercise due care in designing, developing, and manufacturing Defendants' Product so as to avoid the aforementioned risks to individuals using these products;
- b. Failed to include adequate warnings with Defendants' Product that would alert Plaintiff SIMS and other purchasers to its potential risks and serious side effects;

- c. Failed to adequately and properly test Defendants' Product before placing it on the market;
- d. Failed to conduct sufficient testing on Defendants' Product, which if properly performed, would have shown that Defendants' Product had serious side effects, including, but not limited to, death of the dog or cat;
- e. Failed to adequately warn Plaintiff that use of Defendants' Product carried a risk of other serious side effects;
- f. Failed to provide adequate post-marketing warnings or instructions after Defendants knew, or should have known, of the significant risks of ingestion by dogs and cats of Defendants' Product;
- g. Placed an unsafe product into the stream of commerce; and
- h. Was otherwise careless or negligent.

97. Defendants knew, or should have known, that Defendants' Product caused unreasonably dangerous risks and serious side effects of which Plaintiff would not be aware. Defendants nevertheless advertised, marketed, sold and/or distributed Defendants' Product knowing of its unreasonable risks of injury.

98. Defendants knew or should have known that consumers' dogs or cats, such as Plaintiff SIMS' dog, ABBY, would suffer injury and possible death as a result of Defendants' failure to exercise reasonable care as described above.

99. Upon information and belief, Defendants knew or should have known of the defective nature of Defendants' Product, as set forth herein, but continued to design, manufacture, market, and sell Defendants' Product so as to maximize sales and profits

at the expense of the health and safety of the public, including Plaintiff, in conscious and/or negligent disregard of the foreseeable harm caused by Defendants' Product.

100. Defendants failed to disclose to the Plaintiff and the general public facts known or available to them, as alleged herein, in order to ensure continued and increased sales of Defendants' Product. This failure to disclose deprived Plaintiff SIMS of the information necessary for them to weigh the true risks of purchasing Defendants' Product against the benefits.

101. As a direct and proximate result of Plaintiff SIMS' feeding Defendants' Product to their dog, ABBY, Plaintiff SIMS' dog, ABBY, suffered serious health problems and ultimate death.

102. By virtue of Defendants' negligence, Defendants directly, foreseeably and proximately caused Plaintiff SIMS' dog, ABBY, to suffer serious health problems and ultimate death. As a result, the imposition of punitive damages against Defendants is warranted.

103. The damages resulting from the allegations asserted under this cause of action, exceed the district court's original jurisdictional limits as described in Section 4 of the Class Action Fairness Act of 2005.

**WHEREFORE**, Plaintiff demands judgment against Defendants in an amount to be determined upon the trial of this action, together with the costs and disbursements of this action.

**PRAYER FOR RELIEF**

**WHEREFORE**, the class of putative plaintiffs pray for relief, in an amount which exceeds the district court's original jurisdictional limits as described in Section 4 of the Class Action Fairness Act of 2005, as follows:

- a. Awarding damages including but not limited to the money expended on Defendants' defective Product, veterinary bills associated with the treatment, testing, and diagnosis resulted from ingestion of the defective Product, disposal fees after death of the pet and the pecuniary value of the pet;
- b. Awarding punitive damages to Plaintiffs;
- c. Awarding pre-judgment and post-judgment interest to Plaintiffs,
- d. Awarding the costs and expenses of this litigation to Plaintiffs,
- e. Awarding reasonable attorneys' fees and costs to Plaintiffs as provided by law; and
- f. For such further relief as this Court deems necessary, just, and proper.

**WHEREFORE**, Plaintiffs demand judgment against Defendants in an amount to be determined upon the trial of this action, together with the costs and disbursements of this action.

**DEMAND FOR JURY TRIAL**

The Plaintiffs demand a trial by jury on all issues so triable in this civil action.

Dated: March 21, 2007.

CHARLES RAY SIMS and PAMELA SIMS,  
Plaintiffs

LUNDY & DAVIS, L.L.P.  
300 N. College Ave., Suite 309  
Fayetteville, AR 72701  
(479) 527-3921  
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[jhatfield@lundydavis.com](mailto:jhatfield@lundydavis.com)

By: 

Jason M. Hatfield  
Ark. Bar No. 97143

Attorneys for Plaintiffs

## **Exhibit D**

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**KC FILED**

MAR 20 2007

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DAWN MAJERCZYK individually and on )  
behalf of a class of similarly situated individuals, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MENU FOODS, Inc., a New Jersey Corporation, )  
 )  
Defendant. )

07CV1543

JUDGE ANDERSEN

MAGISTRATE JUDGE NOLAN

Jury Trial Demanded

**CLASS ACTION COMPLAINT**

Plaintiff Dawn Majerczyk brings this class action complaint against defendant Menu Foods, Inc. ("Menu Foods") to seek redress for herself and all other individuals injured by its sale of contaminated pet food throughout the United States.

**NATURE OF THE CASE**

1. Menu Foods, one of the largest pet food manufacturers in the world, recently issued a mass recall of 42 brands of cat food and 51 brands of dog food.
2. That recall was issued – belatedly – as a result of evidence that the pet food in question was contaminated with a potentially lethal agent.
3. When ingested by an animal, the contaminated pet food can cause immediate renal failure, resulting in the complete shutdown of the animal's kidneys and, ultimately, its death.
4. Menu Foods' actions in selling the contaminated food and failing to issue the recall sooner were reckless and in breach its duties and warranties to its customers.

5. Those actions were a proximate cause of injury to and the deaths of currently untold numbers of pets, including plaintiff Dawn Majerczyk's cat, as described more fully below.

6. On behalf of a nationwide class, Majerczyk seeks redress for that misconduct.

#### **PARTIES**

7. Plaintiff Dawn Majerczyk is a citizen of Illinois, residing in Cook County, Illinois.

8. Defendant Menu Foods is the self-proclaimed "leading manufacturer of private-label wet pet food in North America." It is a New Jersey Corporation with its principle place of business in New Jersey. It does business throughout the United States, including Cook County, Illinois.

#### **JURISDICTION**

9. The Court has original jurisdiction over this complaint pursuant to 28 U.S.C. § 1332(d) because (a) plaintiff and numerous members of her putative class are citizens of states different from those of which Menu Foods is a citizen, (b) the amount in controversy exceeds \$5,000,000, exclusive of interests and costs, and (c) none of the jurisdictional exceptions contained in 28 U.S.C. § 1332(d)(4)-(5) applies to the instant action.

#### **VENUE**

10. Venue is proper in this district under, *inter alia*, 28 U.S.C. §§ 1391(a)(1).

#### **FACTS**

11. Menu Foods holds itself out to the public as a manufacturer of safe, nutritious, and high-quality dog and cat food.

12. It makes numerous express warranties about the quality of its food and its manufacturing facilities.

13. For example, Menu Foods touts the claim that it “manufacture[s] the private-label, wet pet-food industry’s most comprehensive product program with the highest standards of quality” and it operates “state-of-the-art” manufacturing facilities in the United States and Canada.

14. Menu Foods intended for pet owners to believe its statements and trust that its pet food is of first-rate quality.

15. On or about March 16, 2007, Menu Foods announced a recall of approximately 42 brands “cuts and gravy” style dog food and 51 brands of “cuts and gravy” style cat food, all produced at Menu Foods’ facility in Emporia, Kansas, between Dec. 3, 2006, and March 6, 2007.

16. Weeks before the recall, Menu Foods had received numerous complaints indicating that the pet food originating from the Emporia plant was killing pets.

17. As a result of these complaint, Menu Foods tested its food on approximately 40 to 50 pets. Seven of those pets died after ingesting the food.

18. Despite having actual knowledge of both the complaints it received and its own study, Menu Foods delayed for weeks before issuing the notice of recall.

19. Even then, its recall was conducted in a negligent manner. For example, both its website and the toll-free telephone number it provided to the public were frequently non-operational.

#### **FACTS RELATING TO THE NAMED PLAINTIFF**

20. On or about March 10, 2007, Majerczyk purchased several pouches of Special Kitty Select Cuts from a Walmart store for her nine-year-old cat, Phoenix.

21. Menu Foods is the manufacturer of Special Kitty Select Cuts.

22. On March 16, 2006, shortly after ingesting Menu Food's cat food, Phoenix went into renal failure. Phoenix's kidneys shut down, and on March 17, 2007, he had to be put down.

23. Majerczyk incurred over \$300 in veterinary expenses relating to the attempts to save Phoenix's life.

24. Phoenix had been with Majerczyk's family from birth.

25. The loss was devastating not only to Majerczyk, but also to her seventeen-year-old son and fourteen-year-old daughter as well.

#### **CLASS ALLEGATIONS.**

26. Majerczyk brings this action, pursuant to FRCP 23(b)(3), on behalf of herself and a class (the "Class") consisting of herself and all others who purchased pet food in the United States that was ultimately subject to the March 16, 2007 Menu Foods recall.

27. Upon information and belief, there are over 100,000 members of the Class such that joinder of all members is impracticable.

28. Common questions of law and fact exist as to all members of the Class and predominate over questions affecting individual members. Common questions for the Class include:

(a) Did Menu Foods act negligently in failing to prevent the contamination of its pet food?

(b) Did Menu Foods act negligently in failing to warn its customers in a timely and effective manner of the danger of its pet food?

(c) Did Menu Foods' breach express and/or implied warranties relating to the sale of its pet food?

29. Majerczyk will fairly and adequately protect the interests of the Class, her claims are typical of the claims of the members of the class, and she has retained counsel competent and experienced in class action litigation.

30. A class action is superior to other available methods for fairly and efficiently adjudicating this controversy because, among other things, (a) joinder of all members of the class is impracticable, and (b) many members of the class cannot vindicate their rights by individual suits because their damages are small relative to the burden and expense of litigating individual actions.

#### **COUNT I**

##### **(Breach of Warranties)**

31. Plaintiff incorporates by reference the foregoing allegations.

32. Menu Foods breached express warranties to Plaintiff and violated the Uniform Commercial Code.

33. Menu Foods breached implied warranties to Plaintiff and violated the Uniform Commercial Code.

34. Menu Foods breached the implied warranty of merchantability.

35. As a proximate cause of this misconduct, plaintiff and her class suffered actual damages, including without limitation the cost of the contaminated pet food and any resulting veterinary bills.

WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for the following relief:

1. An order certifying the Class as defined above;
2. An award of actual damages;
3. Appropriate injunctive relief;
4. Medical monitoring damages;
5. Reasonable attorney's fees and costs; and
6. Such further and other relief the Court deems appropriate.

**COUNT II  
(Negligence)**

36. Plaintiff incorporates by reference the foregoing allegations.

37. Menu Foods owed its customers a duty to offer safe, non-contaminated products in the stream of commerce.

38. Menu Foods breached this duty by failing to exercise due care in the producing, processing, manufacturing and offering for sale of the contaminated pet food described herein.

39. Menu Foods further breached this duty by failing timely and effectively to warn plaintiff and the class of the contamination even after it had actual knowledge of that fact and of the resulting risks.

40. As a proximate cause thereof, plaintiff and her class suffered actual damages, including without limitation the cost of the contaminated pet food and any resulting veterinary bills.

WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for the following relief:

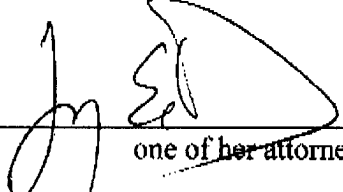
1. An order certifying the Class as defined above;
2. An award of actual damages;
3. Appropriate injunctive relief;
4. Medical monitoring damages;
5. Reasonable attorney's fees and costs; and
6. Such further and other relief the Court deems appropriate.

**JURY DEMAND**

Plaintiff requests trial by jury of all claims that can be so tried.

March 20, 2007

Dawn Majerczyk, individually and on behalf of a  
class of similarly situated individuals

  
\_\_\_\_\_  
one of her attorneys

John Blim  
Jay Edelson  
Myles McGuire (Of Counsel)  
Blim & Edelson, LLC  
53 West Jackson Boulevard  
Suite 1642  
Chicago, Illinois 60604  
(312) 913-9400  
(312) 913-9401 (Fax)

## **Exhibit E**

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FILED ENTERED  
LODGED RECEIVED

MAR 19 2007 DJ

AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
BY DEPUTY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TOM WHALEY individually and on behalf of  
all others similarly situated,

Plaintiff,

vs.

MENU FOODS, a foreign corporation, THE  
IAMS COMPANY, a foreign corporation, DOG  
FOOD PRODUCERS NUMBERS 1- 50 and  
CAT FOOD PRODUCERS 1- 40,

Defendants.

No. **CV7 0411M**  
CLASS ACTION COMPLAINT

1 00000 00000 00000 00000 00000 00000 00000 00000  
1 00000 00000 00000 00000 00000 00000 00000 00000  
07-CV-00411-CMP

Plaintiff Tom Whaley, by and through his undersigned attorneys, Myers & Company,  
P.L.L.C., brings this civil action for damages on behalf of himself and all others similarly  
situated against the above-named Defendants and complains and alleges as follows:

**I. NATURE OF ACTION**

1.1 Mr. Whaley brings this action as a Class Action pursuant to Rule 23 of the  
Federal Rules of Civil Procedure on behalf of all persons who purchased any dog or cat food

CLASS ACTION COMPLAINT - 1

MYERS & COMPANY, P.L.L.C.  
1809 SEVENTH AVENUE, SUITE 700  
SEATTLE, WASHINGTON 98101  
TELEPHONE (206) 398-1188

SEA 8079 JY

1 which was produced by any of the above-named defendants and/or has had a dog or cat become  
2 ill as a result of eating the food.

3 1.2 The defendants are producers and distributors of, *inter alia*, dog and cat food.  
4 Menu Foods produces dog and cat food under familiar brand names such as Iams, Eukanuba and  
5 Science Diet. Menu Foods distributes its dog and cat food throughout the United States to  
6 retailers such as Wal-Mart, Kroger and Safeway.

7 1.3 Dog and cat food which the defendants produced has caused an unknown number  
8 of dogs and cats to become ill and die.

9 1.4 To date, Menu Foods has recalled 50 brands of dog food and 40 brands of cat  
10 food which are causing dogs and cats to become ill. All recalled food to date is of the "cuts and  
11 gravy wet" style.

12 1.5 As a result of the Defendants' actions Mr. Whaley and other Class members have  
13 suffered emotional and economic damage.

## 14 II. PARTIES

15 2.1 Plaintiff Tom Whaley has at all material times been a resident of Ontario, Oregon.

16 2.2 Defendant Menu Foods is, upon information and belief, a corporation organized  
17 under the laws of Canada which transacts business in Washington State and Oregon State.

18 2.3 Defendant The Iams Company, is upon information and belief, a foreign  
19 corporation which transacts business in Washington State and Oregon State.

## 20 III. JURISDICTION AND VENUE

21 3.1 Subject matter jurisdiction is proper under 28 U.S.C. § 1332(a)(1) because the  
22 Plaintiff and Defendants are citizens of different states and the amount in controversy exceeds  
23

1 \$75,000.00. This court has supplemental jurisdiction over the state law claims pursuant to 28  
2 U.S.C. § 1367.

3 3.2 Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a) because  
4 the Defendants systematically and continuously sold their product within this district and  
5 Defendants transact business within this district.

#### 6 IV. CLASS ACTION ALLEGATION

7 4.1 Mr. Whaley brings this suit as a class action pursuant to Rules 23(a), (b)(1), (b)(2)  
8 and (b)(3) of the Federal Rules of Civil Procedure, on behalf of himself and a Plaintiff Class (the  
9 "Class") composed of all persons who purchased any dog or cat food which was produced by the  
10 defendants and/or has had a dog or cat become ill as a result of eating the food. Mr. Whaley  
11 reserves the right to modify this class definition prior to moving for class certification.  
12

13 4.2 This action has been brought and may be properly maintained as a class action  
14 pursuant to Rule 23 of the Federal Rules of Civil Procedure for the following reasons:

15 a. The Class is ascertainable and there is a well-defined community of  
16 interest among the members of the Class;

17 b. Membership in the Class is so numerous as to make it impractical to bring  
18 all Class members before the Court. The identity and exact number of Class members is  
19 unknown but is estimated to be at least in the hundreds, if not thousands considering the fact that  
20 Menu Foods has identified 50 dog foods and 40 cat foods which may be causing harm to pets.  
21

22 c. Mr. Whaley's claims are typical of those of other Class members, all of  
23 whom have suffered harm due to Defendants' uniform course of conduct.

24 d. Mr. Whaley is a member of the Class.  
25

1 e. There are numerous and substantial questions of law and fact common to  
2 all of the members of the Class which control this litigation and predominate over any individual  
3 issues pursuant to Rule 23(b)(3). The common issues include, but are not limited to, the  
4 following:

5 i. Did the defendants make representations regarding the safety of  
6 the dog and cat food they produced and sold?

7 ii. Were the defendants' representations regarding the safety of the  
8 dog and cat food false?

9 iii. Did the defendants' dog and cat food cause Mr. Whaley and other  
10 Class members' pets to become ill?

11 iv. Were Mr. Whaley and other Class members damaged?

12 f. These and other questions of law or fact which are common to the  
13 members of the Class predominate over any questions affecting only individual members of the  
14 Class;  
15

16 g. Mr. Whaley will fairly and adequately protect the interests of the Class in  
17 that Mr. Whaley has no interests that are antagonistic to other members of the Class and has  
18 retained counsel competent in the prosecution of class actions to represent himself and the Class;  
19

20 h. Without a class action, the Class will continue to suffer damage,  
21 Defendants' violations of the law or laws will continue without remedy, and Defendants will  
22 continue to enjoy the fruits and proceeds of their unlawful misconduct;

23 i. Given (i) the substantive complexity of this litigation; (ii) the size of  
24 individual Class members' claims; and (iii) the limited resources of the Class members, few, if  
25

1 any, Class members could afford to seek legal redress individually for the wrongs Defendants  
2 have committed against them;

3 j. This action will foster an orderly and expeditious administration of Class  
4 claims, economies of time, effort and expense, and uniformity of decision;

5 k. Inferences and presumptions of materiality and reliance are available to  
6 obtain class-wide determinations of those elements within the Class claims, as are accepted  
7 methodologies for class-wide proof of damages; alternatively, upon adjudication of Defendants'  
8 common liability, the Court can efficiently determine the claims of the individual Class  
9 members;  
10

11 l. This action presents no difficulty that would impede the Court's  
12 management of it as a class action, and a class action is the best (if not the only) available means  
13 by which members of the Class can seek legal redress for the harm caused them by Defendants.

14 m. In the absence of a class action, Defendants would be unjustly enriched  
15 because they would be able to retain the benefits and fruits of their wrongful conduct.

16 4.3 The Claims in this case are also properly certifiable under applicable law.

#### 17 V. STATEMENT OF FACTS

18 5.1 Plaintiff Tom Whaley was the owner of a female cat named Samoya.

19 5.2 Mr. Whaley purchased Iams brand cuts and gravy wet-style cat food from Wal-  
20 Mart for Samoya to consume.

21 5.3 Samoya ate the Iams brand cuts and gravy wet-style cat food between December  
22 2006 and February 2007.  
23  
24  
25

1           5.4     Samoya became extremely ill and Mr. Whaley took her to a veterinarian who  
2 informed him that Samoya had suffered kidney failure, also known as acute renal failure.  
3 Samoya had to be euthanized.

4           5.5     In March 2007 Menu Foods recalled 50 brands of cuts and gravy wet-style dog  
5 food and 40 brands of cuts and gravy wet-style cat food which had caused dogs and pets to  
6 become ill. One common symptom in the sick animals was kidney failure, also known as acute  
7 renal failure.

8           5.6     The Iams brand cuts and gravy wet-style cat food that Samoya consumed between  
9 December 2006 and February 2007 is one of the brands that Menu Foods recalled.

10          5.7     As a result of Defendants' acts and omissions Mr. Whaley and other Class  
11 members have suffered emotional and economic damage.

## 12                               VI.     CAUSES OF ACTION

### 13                   A.     Breach of Contract

14          6.1     Plaintiff realleges all prior allegations as though fully stated herein.

15          6.2     Plaintiff and Class members purchased pet food produced by the defendants based  
16 on the understanding that the food was safe for their pets to consume.

17          6.3     The pet food produced by the defendants was not safe for pets to consume and  
18 caused dogs and cats to become ill. The unsafe nature of the pet food constituted a breach of  
19 contract.

20          6.4     As a result of the breach Plaintiffs and Class members suffered damages which  
21 may fairly and reasonably be considered as arising naturally from the breach or may reasonably  
22 be supposed to have been in the contemplation of the parties, at the time they made the contract,  
23 as the probable result of the breach of it.

1 B. Unjust Enrichment

2 6.5 Mr. Whaley realleges all prior allegations as though fully stated herein.

3 6.6 Defendants were and continue to be unjustly enriched at the expense of Mr.  
4 Whaley and other Class members.

5 6.7 Defendants should be required to disgorge this unjust enrichment.

6 C. Unlawful, Deceptive and Unfair Business Practices

7 6.8 Mr. Whaley realleges all prior allegations as though fully stated herein.

8 6.9 Defendants' sale of tainted pet food constitutes an unlawful, deceptive and unfair  
9 business act within the meaning of the Washington Consumer Protection Act, RCW 19.86 *et*  
10 *seq.*, and similar statutory enactments of other states (including consumer protection and  
11 consumer sales practice acts).  
12

13 6.10 Defendants' sale of hazardous pet food has the capacity to deceive a substantial  
14 portion of the public and to affect the public interest.

15 6.11 As a result of Defendants' unfair or deceptive acts or practices Mr. Whaley and  
16 other class members suffered injuries in an amount to be proven at trial.

17 D. Breach of Warranties

18 6.12 Mr. Whaley realleges all prior allegations as though fully stated herein.

19 6.13 Cat food and dog food produced by Menu Foods are "goods" within the meaning  
20 of Uniform Commercial Code Article 2.  
21

22 6.14 Defendants' conduct as described herein constitutes breach of an implied or  
23 express warranty of affirmation.

24 6.15 Defendants' conduct as described herein constitutes breach of an implied  
25 warranty of merchantability.

1           6.16 Defendants' conduct as described herein constitutes breach of an implied  
2 warranty of fitness for a particular purpose.

3           6.17 As a proximate result of the aforementioned wrongful conduct and breach, Mr.  
4 Whaley and other class members have suffered damages in an amount to be proven at trial.  
5 Defendants had actual or constructive notice of such damages.

6           E. Negligent Misrepresentation

7           6.18 Mr. Whaley realleges all prior allegations as though fully stated herein.

8           6.19 Defendants owed Mr. Whaley and class members a duty to exercise reasonable  
9 care in representing the safety of its dog and cat foods.

10           6.20 Defendants falsely represented that its dog and cat food was safe for consumption  
11 by dogs and cats.

12           6.21 In reality, defendants' dog and cat food caused dogs and cats to become ill and, in  
13 some cases, to die.

14           6.22 Mr. Whaley and class members reasonably relied on the information provided by  
15 Defendants regarding the safety of its dog and cat food.

16           6.23 As a proximate cause of Defendants' false representations Mr. Whaley and other  
17 Class members suffered damages in an amount to be proven at trial.

18                               **VII. PRAYER FOR RELIEF**

19           WHEREFORE, Mr. Whaley and Class members request that the Court enter an order of  
20 judgment against Defendants including the following:

21           A. Certification of the action as a class action pursuant to Rule 23(b)(3) of the  
22 Federal Rules of Civil Procedure with respect to the claims for damages, and appointment of  
23 Plaintiffs as Class Representatives and their counsel of record as Class Counsel;



1 B. Actual damages (including all general, special, incidental, and consequential  
2 damages), statutory damages (including treble damages), punitive damages (as allowed by the  
3 law(s) of the states having a legally sufficient connection with defendants and their acts or  
4 omissions) and such other relief as provided by the statutes cited herein;

5 C. Prejudgment and post-judgment interest on such monetary relief;

6 D. Equitable relief in the form of restitution and/or disgorgement of all unlawful or  
7 illegal profits received by Defendants as a result of the unfair, unlawful and/or deceptive conduct  
8 alleged herein;  
9

10 E. Other appropriate injunctive relief;

11 F. The costs of bringing this suit, including reasonable attorneys' fees; and

12 G. Such other relief as this Court may deem just, equitable and proper.

13 DATED this 19<sup>th</sup> day of March, 2007.

14 MYERS & COMPANY, P.L.L.C.

15 Attorneys for Plaintiffs and Class members

16  
17 By: /s/ Michael David Myers  
18 Michael David Myers  
19 WSBA No. 22486  
20 Myers & Company, P.L.L.C.  
21 1809 Seventh Avenue, Suite 700  
22 Seattle, Washington 98101  
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24 Facsimile: (206) 400-1112  
25 E-mail: [mmyers@myers-company.com](mailto:mmyers@myers-company.com)

## **Exhibit F**

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8 Kings Highway West  
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BERGER & MONTAGUE, P.C.  
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Michael T. Fantini, Esquire  
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1622 Locust Street  
Philadelphia, PA 19103  
(215) 875-3000

Attorneys for Plaintiffs and the Class

---

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

Jared Workman, and Mark and Mona Cohen,  
on behalf of themselves and all others  
similarly situated,

Plaintiffs,

vs.

Menu Foods Limited, Menu Foods Inc., and  
Menu Foods Midwest Corporation

Defendants,

Civil Action No. \_\_\_\_\_

COMPLAINT - CLASS ACTION  
JURY TRIAL DEMANDED

---

**PLAINTIFFS' CLASS ACTION COMPLAINT**

Plaintiffs Jared Workman, and Mark and Mona Cohen, by their attorneys, allege upon information and belief, the following:

1. This class action is brought, and these proceedings instituted, to redress the harms resulting from the manufacture, production, and sale by Menu Foods Limited, Menu Foods Inc. and Menu Foods Midwest Corporation of dog and cat food marketed under over 90 brand names.

Plaintiffs make the following allegations, except as to the allegations specifically pertaining to Plaintiffs and Plaintiffs' counsel, based upon the investigation undertaken by Plaintiffs' counsel, which included, inter alia, review and analysis of Defendant's website, press releases, news articles, and pleadings filed in other suits.

#### PRELIMINARY STATEMENT

2. Defendants manufacture and sell over 90 brands of pet food for cats and dogs, including popular labels like Iams and Eukanuba and private label brands sold at large retail chains. On March 16, 2007, the parent company of Menu Foods Limited issued a press release announcing the recall of 60 million cans of contaminated dog and cat food manufactured between December 3, 2006 and March 6, 2007. The recall covers the "cuts and gravy" style pet foods in cans and pouches manufactured at two of Menu Foods Limited's U.S. manufacturing facilities - Menu Foods, Inc. and Menu Foods Midwest Corporation, located in New Jersey and Kansas, respectively.

3. The recalled pet food that Plaintiffs and Class members purchased and fed to their pets caused their pets to become ill through kidney disease, requiring veterinarians visits, medications, hospitalizations and, in some cases, burials of those pets that died due to renal failure caused by the contaminated pet food. Many pets that consumed the recalled tainted food now require ongoing monitoring of their health to ascertain the extent of the damage to their kidneys.

4. Plaintiffs here seek damages, injunctive relief, attorneys' fees, and costs against Defendants.

## **PARTIES**

5. Plaintiff Jared Workman resides at 1150 Unit D, Monroe Drive, Boulder, CO, 80303. Plaintiff Workman purchased and fed his cat Iams pet food that was manufactured by Defendants during the Class Period. This cat, named Seth, became ill with kidney disease, was hospitalized, and subsequently died of acute renal failure. In addition to the cost of purchasing the contaminated food, Plaintiff Workman incurred economic costs in connection with the medical treatment and burial of his cat, as well as continuous medical monitoring of his other two cats.

6. Plaintiffs Mark and Mona Cohen reside at 1415 Brighton Street, Philadelphia, PA 19111. Plaintiffs purchased and fed their dog Iams pet food that was manufactured by Defendants during the Class Period. This dog, named Cookie, subsequently developed symptoms of acute renal failure. In addition to the cost of purchasing the contaminated food, the Cohens incurred economic costs in connection with the medical treatment and damage to personal property caused by their dog's illness.

7. Defendant Menu Foods Limited is a Canadian corporation located at 8 Falconer Dr., Mississauga, ON, L5N 1B1. Menu Foods Limited has done business throughout the United States and in the State of New Jersey at all times relevant to this lawsuit.

8. Defendant Menu Foods Inc. is a New Jersey corporation, with its headquarters at 9130 Griffith Mogan Lane, Pennsauken, NJ 08110. Menu Foods Inc. has done business throughout the United States and in the State of New Jersey at all times relevant to this lawsuit. Menu Foods Inc. is a wholly-owned subsidiary of Menu Foods Limited and manufactures pet food for distribution in the United States.

9. Defendant Menu Foods Midwest Corporation is a Delaware corporation, with its headquarters at PO Box 1046, 1400 East Logan Ave., Emporia, KS 66801. Menu Foods Midwest Corporation has done business throughout the United States and in the State of New Jersey at all times relevant to this lawsuit. Menu Foods Midwest Corporation is a wholly-owned subsidiary of Menu Foods Limited and manufactures pet food for distribution in the United States.

10. The events complained of occurred throughout the United States and in the State of New Jersey.

#### **JURISDICTION AND VENUE**

11. This Court has original jurisdiction over this class action under 28 U.S.C. §1332(d)(2), (d) (5)(B), (d) (6) because (i) there are 100 or more class members, (ii) there is an aggregate amount in controversy of at least \$5,000,000, exclusive of interest and costs, and (iii) there is minimal diversity because at least one plaintiff and one defendant are citizens of different states.

12. Venue in this Court is proper in that Defendants transacted business in this county and the conduct complained of occurred in this district, as well as elsewhere in New Jersey.

#### **STATEMENT OF FACTS**

13. Defendant Menu Foods Limited purports to be the leading North American private label/contract manufacturer of wet pet food products sold by supermarket retailers, mass merchandisers, pet specialty retailers, and other retail and wholesale outlets. In 2006, Menu Foods Limited produced more than one billion containers of pet food.

14. Defendant Menu Foods Limited is the parent company of, and wholly-owns, both

Defendant Menu Foods, Inc. ("MFI"), located in Pennsauken, New Jersey, and Defendant Menu Foods Midwest Corporation ("MFMC"), located in Emporia, Kansas. MFI and MFMC are two of Menu Food Limited's manufacturing facilities in the United States.

15. At least from December 3, 2006 through March 6, 2007, Defendants failed to adhere to proper safety standards and failed to ensure that the pet food they manufactured and sold was free from contamination. More specifically, on March 16, 2007, the parent company of Menu Foods Limited issued a press release whereby it announced the recall of a portion of the dog and cat food manufactured between December 3, 2006 and March 6, 2007. The recall covers the "cuts and gravy" style pet foods in cans and pouches manufactured at two of Menu Food Limited's facilities - MFI located in Pennsauken, New Jersey and MFMC in Emporia, Kansas.

16. Reportedly, 60 million cans and pouches of the pet food were recalled.

17. The recalled pet food was sold under more than 90 brand names, including popular labels like Iams and Eukanuba and private label brands sold at large retail chains. A list of all brand names that were recalled is contained on the Company's website and is attached hereto as Addendum A. Retailers who sold the contaminated products include Ahold USA, Kroger Co., Safeway, Wal-Mart, Pet Smart, and Pet Value, among others.

18. Menu Foods Limited acknowledges receiving complaints in the United States which raised concern about pet food manufactured since early December 2006, and its impact on the renal health of the pets consuming the products. The Company has discovered that timing of the production associated with these complaints coincides with the introduction of an ingredient from a new supplier.

19. Stephen Sundlof, the Food and Drug Administration's (FDA) chief veterinarian,

said that Menu Foods began its own taste tests of its pet food beginning February 27, 2007 in approximately 40 to 50 pets. Within a few days, animals began showing signs of sickness. In early March 2007, 7 animals died. Menu Foods announced its recall weeks later, on March 16, 2007.

20. The FDA has reported that it received numerous calls and complaints from owners of sick and deceased pets, who flooded phone lines at State FDA offices, as well as calls from veterinarians and pet food companies. See Los Angeles Times, March 20, 2007.

21. To date, there are 15 confirmed death. The FDA expects the death toll to rise.

22. The FDA said that the investigation is focused on problems with wheat gluten, which Menu Foods Limited said had been coming from a new supplier. Wheat gluten is a source of protein and was used to thicken the gravy in the pet food.

23. Plaintiff Jared Workman owned a cat named Seth. During December 2006, Plaintiff Workman fed his cat Iams pet food, as well as other brand name cat foods which are now listed on the Company's recall list as contaminated products.

24. In December 2006, Plaintiff Workman noticed that his cat, Seth, was acting strangely. He was lethargic and eating less than usual. Plaintiff called his cat veterinarian, who came to the house to perform blood work. The vet reported that Seth was dying of kidney failure. Plaintiff Workman then took Seth to an animal hospital in Greeley, Colorado. After several days in the hospital, it became clear that Seth was most likely suffering from acute renal failure. After about one week in the hospital, and despite constant medical treatment, Seth died.

25. In addition to Plaintiff Workman suffering emotional distress from the loss of his cat, he spent approximately \$2,500 in veterinarian bills and burial costs, which was not covered



by insurance. In addition, Plaintiff Workman spend almost \$300 to have his other two cats tested, and will incur additional costs to have them continually monitored. In addition to these costs, Plaintiff Workman has not received any refunds for the cost of the contaminated pet food that he initially purchased. Finally, he estimates that it will cost him approximately \$1,000 to purchase a new cat.

26. Plaintiffs Mark and Mona Cohen own an 11 month old dog named Cookie that is a Yorkie-Bijain mix. Beginning January 2007, the Cohens' dog Cookie became violently ill with severe vomiting. The Cohens had been feeding Cookie Iams dog food.

27. In January and February 2007, Cookie's condition worsened and Cookie developed symptoms of kidney disease, including vomiting, lethargy, excessive thirst, loss of appetite and dehydration. The Cohens took Cookie to the veterinarian on four separate occasions, including a midnight visit on February 9, 2007 to a veterinarian emergency room which required an x-ray at an additional cost of \$300.

28. Although the Cohens' suspected that the Iams food might be involved in Cookie's condition, they were assured by their salesperson at PetSmart that this was unequivocally not the case and that Cookie should not be switched to a different dog food. The Cohens, however, insisted a switch be made, and purchased, at the recommendation of their PetSmart salesperson, a dog food under the brand name Nutro. Both Iams and Nutro were manufactured and recalled by Defendants.

29. Cookie is currently on an anti-nausea medication called Reglin and requires additional vetrinarian visits and monitoring of her kidney functions.

30. In addition to suffering emotional distress, the Cohens have incurred the costs of

medical bills not covered by their pet insurance, prescription medication bills, damage to their personal property including rugs and carpets caused by their's pet's illness, and the costs of future medical monitoring of their dog.

31. As a result of Defendants' wrongful actions, Plaintiffs and Class members have sick or deceased pets, and have suffered economic damages, including, but not limited to, the costs of the recalled pet food, the costs of medical treatment for their pets, burial costs, the costs to replace their pets, and the costs to replace or clean personal property damaged as a result of their pets' illnesses.

32. In addition, their pets will require continuous medical monitoring to gauge the long-term effects of the contaminated pet food on their kidney functions and overall health. Therefore, because the precise impact on the health of class members' pets is not currently known, Plaintiffs and the Class seek the cost of medical monitoring for their pets.

#### **CLASS ACTION ALLEGATIONS**

33. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated.

34. The class which Plaintiffs seek to represent are composed of all persons in the United States who purchased any of the pet food brands manufactured by Defendants during the period commencing December 3, 2006, and ending March 6, 2007 (the "Class Period") that were recalled by Defendants.

35. The class is composed of thousands, and possibly millions, of persons, the joinder of whom is not practicable. The disposition of their claims in a class action will benefit both the parties and the Court. Defendants have recalled 60 million cans of pet food that it sold

throughout the United States during the Class Period, and thus the Class is sufficiently numerous to make joinder impracticable, if not impossible.

36. There are questions of fact and law which are common to all members of the class, including, inter alia, the following:

1. Whether Defendants breached any express or implied warranties when they manufactured and sold the recalled pet food;
2. Whether Defendants' negligently manufactured and sold the recalled pet food; and
3. Whether the Class has been damaged, and if so, the appropriate measure of damages including the nature of the equitable relief to which the class is entitled.

37. The above common issues of fact and law predominate over any arguable individualized issues.

38. Plaintiffs' claims are typical of the claims of the other members of the class because Plaintiffs' and all of the Class members' damages arise from and were caused by having purchased and fed the recalled pet food to their pets. As a result, the evidence and the legal theories regarding Defendants' alleged wrongful conduct are identical for Plaintiffs and all of the Class members.

39. Plaintiffs will fairly and adequately protect the interests of the members of the Class, and Plaintiffs have no interests which are contrary to or in conflict with those of the Class they seek to represent. Plaintiffs have retained competent counsel experienced in class action litigation to further ensure such protection and to prosecute this action vigorously.

40. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the

class, which would establish incompatible standards of conduct for the party opposing the class and would lead to repetitious trials of the numerous common questions of facts and law.

Plaintiffs do not believe that any difficulty will be encountered in the management of this litigation that would preclude its maintenance as a class action. Plaintiffs believe and therefore aver that claims are small in relation to the costs of an individual suit, and a class action is the only proceeding pursuant to which Class members can, as a practical matter, recover. As a result a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

41. Proper and sufficient notice of this action may be provided to the Class members through notice published in appropriate publications.

42. Plaintiffs and the members of the Class have suffered irreparable harm and damages as a result of the Defendants' wrongful conduct as alleged herein. Absent representative action, Plaintiffs and the members of the Class will continue to suffer losses, thereby allowing these violations of law to proceed without remedy.

#### **COUNT I - BREACH OF EXPRESS WARRANTY**

43. Plaintiffs incorporate by reference the preceding paragraphs as if they were fully set forth herein.

44. Defendants expressly warranted that the recalled brands of pet food were, in fact, ingestible food that was safe for consumption by dogs and cats.

45. In addition, Defendants made numerous express warranties about the quality of its food and its manufacturing facilities. For example, Menu Foods touts the claim that it "manufacture[s] the private-label wet pet-food industry's most comprehensive product program

with the highest standards of quality” and it operates “state-of-the-art” manufacturing facilities in the United States and Canada.

46. Members of the Class were induced by Defendants’ labeling, advertising and marketing the recalled brands of pet food as “food” to rely upon said express warranty, and did so rely in purchasing the recalled brands of pet food and feeding them to their pets.

47. In reliance on Defendants’ untrue warranties, Plaintiffs and the Class purchased the recalled pet food and fed that food to their pets.

48. Plaintiffs and members of the Class sustained damages as a proximate result of said breach of warranty.

## **COUNT II - BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY**

49. Plaintiffs incorporate by reference the preceding paragraphs as if they were fully set forth herein.

50. Defendants are merchants pursuant to sections 2-104 and 2-314 of the Uniform Commercial Code with respect to pet foods.

51. Through Defendants’ marketing, labeling, and sales, Defendants impliedly warranted that the recalled pet food, which was sold to Plaintiffs and Class members and fed to their pets, was fit for the ordinary purpose for which it was intended, namely, to safely feed and nourish pets without any resulting negative health effects, pursuant to section 2-314 of the Uniform Commercial Code.

52. Through Defendants' marketing, labeling, and sales, Defendants knew that Plaintiffs and Class members would purchase the recalled pet food at issue for the ordinary purpose of feeding their pets.

53. Defendants manufactured, labeled, advertised, sold, and distributed the recalled pet foods at issue for the ordinary purpose for which it was purchased by Plaintiffs.

54. Plaintiffs and Class members purchased and used the recalled pet foods for the ordinary purposes for which such goods are sold, namely feeding them to their pets.

55. Plaintiffs and Class members relied upon Defendants' representations and claims in purchasing the recalled pet foods.

56. The recalled pet foods purchased by Plaintiffs and Class members were unfit for their ordinary purpose when sold. In fact, such pet foods were contaminated and caused severe illness and/or death of the pets that consumed them. Therefore, Defendants breached the implied warranty of merchantability in the sale of the recalled pet foods at issue.

57. Plaintiffs and members of the Class sustained damages as a proximate result of said breach of warranty.

### **COUNT III - NEGLIGENCE**

58. Plaintiffs incorporate by reference the preceding paragraphs as if they were fully set forth herein.

59. Defendants owed a duty to pet owners who purchased its products to ensure that their pet food was safe for pets to consume and free from contamination, such that no pets consuming these products would be injured or die as a result of such consumption.

60. Defendants breached said duty as described herein above when they failed to

adhere to proper safety standards and failed to properly ensure the safety of their products when they sold contaminated pet food, proximately causing damage to Plaintiffs and members of the Class.

61. As a proximate result of the Defendants' conduct described herein, Plaintiffs and members of the Class have suffered damages as a result and continue to suffer damages as a result.

### **JURY DEMAND**

Plaintiffs hereby request a trial by jury on all issues triable by right before a jury.

### **PRAYER FOR RELIEF**

THEREFORE, Plaintiffs pray for judgment as follows:

1. That this Court certify this action as a Class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), and appoint Plaintiffs and their counsel to represent the Class;
2. That this Court enter judgment and award damages in favor of Plaintiffs and the Class, and against Defendants under the theories alleged herein;
3. That this Court establish a fund for the medical monitoring of Plaintiffs' pets to discover and treat the extent of kidney damage these pets have suffered as a result of consuming Defendants' recalled pet food;
4. That this Court award Plaintiffs all attorneys' fees, expenses and costs of this suit;
5. That this Court award Plaintiffs pre-judgment and post-judgment interest at the maximum rate allowable by law, compounded daily; and

6. That this Court grant such other, further, and different relief that the Court deems necessary, just, and proper.

Dated: March 22, 2007

Respectfully submitted,

TRUJILLO RODRIGUEZ & RICHARDS, LLC

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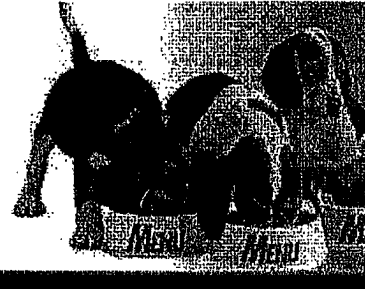
Schedule A

Recalled Menu Foods' Pet Food Brands<sup>1</sup>

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<sup>1</sup> [http://www.menufoods.com/recall/product\\_cat.html](http://www.menufoods.com/recall/product_cat.html), accessed March 21, 2007;  
[http://www.menufoods.com/recall/product\\_dog.html](http://www.menufoods.com/recall/product_dog.html), accessed March 21, 2007.

# MENU FOODS INCOME FUND



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## Recalled Dog Product Information

### Recall Information 1-866-895-2708

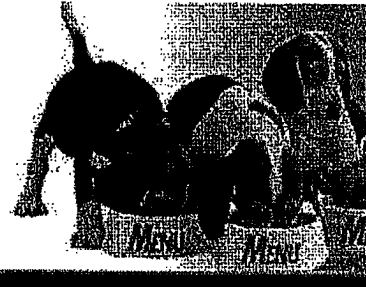
1. [Americas Choice, Preferred Pets](#)
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5. [Big Bet](#)
6. [Big Red](#)
7. [Bloom](#)
8. [Cadillac](#)
9. [Companion](#)
10. [Demoulas Market Basket](#)
11. [Eukanuba](#)
12. [Food Lion](#)
13. [Giant Companion](#)
14. [Great Choice](#)
15. [Hannaford](#)
16. [Hill Country Fare](#)
17. [Hy-Vee](#)
18. [Jams](#)
19. [Laura Lynn](#)
20. [Loving Meals](#)
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23. [Mixables](#)
24. [Nutriplan](#)
25. [Nutro Max](#)
26. [Nutro Natural Choice](#)
27. [Nutro Ultra](#)
28. [Nutro](#)
29. [O'Roy Canada](#)
30. [O'Roy US](#)
31. [Paws](#)
32. [Pet Essentials](#)
33. [Pet Pride - Good n Meaty](#)
34. [Presidents Choice](#)
35. [Price Chopper](#)
36. [Priority Canada](#)
37. [Priority US](#)

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- 38. Publix
- 39. Roche Brothers
- 40. Save-A-Lot
- 41. Schnucks
- 42. Shep Dog
- 43. Springfield Prize
- 44. Sprout
- 45. Stater Brothers
- 46. Stop & Shop Companion
- 47. Tops Companion
- 48. Wegmans Bruiser
- 49. Wels Total Pet
- 50. Western Family US
- 51. White Rose
- 52. Winn Dixie
- 53. Your Pet

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## Recalled Cat Product Information

### Recall Information 1-866-895-2708

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31. [Sophistacat](#)
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